

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3178

Heard in Montreal, Wednesday, 10 January, 2001

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Whether or not Mr. Lynch had the right to displace onto a 2.2 position upon termination of his temporary assignment to an excluded position.

CORPORATION'S STATEMENT OF ISSUE:

Mr. Lynch held the position of Senior Telephone Sales Agent in the Montreal TSO prior to his assignment to an excluded position on December 1, 1998. The Senior Telephone Sales Agent position was governed by article 2.2 of collective agreement no. 1.

The Corporation protected the position an additional 60 days over and above the 90 days' requirement under article 11.9. Mr. Lynch chose not to return to his former position and a new Senior Telephone Sales Agent was selected.

The excluded position ended on July 31, 1999 and Mr. Lynch attempted to displace onto a different Senior Telephone Sales Agent position. The Corporation would not permit the displacement.

The Union alleges Mr. Lynch should have been permitted to displace the Senior Telephone Sales Agent in accordance with article 11.9.

The Corporation maintains that the position is governed by article 2.2 and the Corporation had the right of selection. In addition, the Corporation relies on the past practice that those with displacement rights have not been permitted to displace onto a position governed by article 2.2.

UNION'S STATEMENT OF ISSUE:

Le 31 juillet 1999, au moment où M. Patrick Lynch a été délogé du poste qu'il occupait depuis le 1 décembre 1998, la Société lui a refusé à son retour dans l'unité de négociation, l'exercice de ses droits d'ancienneté sur le poste d'Agent principal de ventes par téléphone et, suivant ce refus, de démontrer ses aptitudes sur ce poste qu'il avait occupé auparavant du 12 décembre 1997 au 30 novembre 1998. Il a donc été dans l'obligation d'exercer ses droits

d'ancienneté sur un poste d'Agent de ventes par téléphone, et a encouru une perte de salaire et d'avantages sociaux.

Le Syndicat prétend que la Société a violé les dispositions de l'article 11.9 lorsqu'elle a refusé au plaignant l'exercice de ses droits d'ancienneté sur le poste concerné alors qu'il avait les qualifications requises. En outre, le Syndicat prétend que la Société a violé les dispositions de l'article 13.6 lorsqu'elle a refusé au plaignant le droit de démontrer ses aptitudes à occuper ce poste. Enfin, le Syndicat prétend que la Société a appliqué de manière hors contexte, erronée et non fondée les dispositions de l'article 2.2 lorsqu'elle a refusé illégalement d'accorder le poste concerné au plaignant.

Le Syndicat réclame que le poste d'Agent principal de ventes par téléphone soit attribué au plaignant avec redressement total.

La Société prétend qu'elle n'a violé aucune des dispositions de la convention collective #1 et a décliné la réclamation du Syndicat. La Société prétend que selon les dispositions de l'article 2.2 le plaignant avait perdu le droit de revenir sur le poste concerné et qu'elle détenait le privilège de faire le choix ainsi que d'accorder la promotion être donnée.

FOR THE UNION:

(SGD.) R. JOHNSTON

PRESIDENT, COUNCIL 4000

FOR THE CORPORATION:

(SGD.) E. J. HOULIHAN

FOR: DIRECTOR, HUMAN RESOURCES AND LABOUR RELATIONS

There appeared on behalf of the Corporation:

D. Trubian	- Senior Officer, Labour Relations, Montreal
E. J. Houlihan	- Senior Manager, Labour Relations, Montreal
L. LaPlante	- Senior Officer, Labour Relations, Montreal
G. Dagostino	- Manager, Montreal Call Centre, Montreal

And on behalf of the Union:

A. Rosner	- National Representative, Montreal
R. Massé	- Regional Representative, Montreal
D. Andru	- Regional Representative, Toronto
D. Lussier	- Local Chairperson, Montreal
S. Auger	- Union Delegate, Montreal
B. Dulong	- Union Delegate, Montreal
P. Lynch	- Greivor

AWARD OF THE ARBITRATOR

The facts relating to this grievance are not in dispute. The grievor, employed by the Corporation since May of 1984, held a position of Senior Telephone Sales Agent (STSA) at the Montreal Call Centre. That is a "right of selection" position governed by the provisions of article 2.2 of the collective agreement, whereby the Corporation has a discretion in the

selection of individuals to fill permanent vacancies. In December of 1998 Mr. Lynch was offered a temporary assignment in a position out of the bargaining unit, at a higher rate of pay, to work as a VIAnet analyst in the introduction of the Corporation's computerized ticketing system. Although the Corporation's representatives submit that he was advised that the position would last approximately thirty days, in fact the assignment lasted some eight months, from December 1, 1998 to July 31, 1990.

At the conclusion of his assignment the grievor sought to exercise his seniority to return to work as a Senior Telephone Sales Agent. The Corporation took the position that the grievor could not displace into a position as an STSA, by reason of the fact that positions in that classification are governed by article 2.2 of the collective agreement. The issue in this grievance is, therefore, whether Mr. Lynch was entitled to displace back to a position in the Montreal Call Centre as a Senior Telephone Sales Agent upon the expiry of his temporary promotion out of the bargaining unit. The Union maintains that the grievor was entitled to so displace under the provisions of article 11.9 of the collective agreement.

The pertinent articles of the collective agreement read as follows:

11.9 Effective June 14, 1995, an employee holding seniority under this agreement and who is presently filling or who may in the future be promoted to an official or any position with the Corporation which is excepted from any provision of this or any collective agreement, will have his name continued on the seniority list of the group from which promoted at his home seniority terminal and will retain seniority rights and continue to accumulate seniority while so employed for a period of twelve (12) consecutive months. Thereafter, such employee will cease to accumulate any further seniority until he returns to a position within the bargaining unit. The Chairperson shall be advised when the promotion is of a permanent nature. The period of twelve consecutive months may be extended through a management-union accord.

NOTE: In the application of this paragraph, should an employee holding a non-scheduled, official or excepted position be set back to a position covered by this collective agreement for a period of less than three months, such time will be considered as part of the twelve consecutive months.

When an employee, who has not forfeited his seniority under the above provisions, is released from such excepted employment, except at his own request or as provided in article 12.19, he may exercise his seniority rights to any position in his seniority group which he is qualified to fill. He must make his choice of a position, in writing, within ten calendar days from the date of release from excepted employment and commence work on such position within 30 calendar days from the date of release from excepted employment. Failing this, he shall forfeit his seniority and his name shall be removed from the seniority list.

NOTE: When an employee is temporarily promoted to an excepted position for less than 90 days, his position will be filled in accordance with article 12.6. When released from the excepted position he must return to his regular assignment.

2.2 The selection of a suitable employee to fill an opening in the following classifications shall be made from the employees without the necessity of bulletining and the appointment shall not be subject to appeal:

Secretary (those positions which fell within the scope of previous collective agreements)

Special Traffic Clerk, Vancouver

Special Traffic Clerk, Edmonton

Senior Counter Sales Agent (except those at Belleville, Halifax and Moncton, Sydney, Saint John, Campbellton, Truro and Charlottetown)

Senior Telephone Sales Agent

The positions of both parties are readily understandable. The Union submits that the grievor agreed, in effect, to do the Corporation a favour by lending his particular skills and services to an urgent project for a temporary period. In its view it is inequitable, and contrary to the collective agreement, for the grievor to be effectively stripped of his seniority protection by being denied the ability to return to his former position. Its representative submits that on a straightforward application of article 11.9 Mr. Lynch must be viewed as entitled to "... exercise his seniority rights to any position in his seniority group which he is qualified to fill." That, he submits, includes the right to opt for displacement back to a position as Senior Telephone Sales Agent.

The Corporation, on the other hand, sees in the Union's position an undermining of what it views as the protected nature of positions in respect of which vacancies are filled by a right of selection under the terms of article 2.2 of the collective agreement. In its view, to allow the Union's position effectively undermines the discretion of the Corporation to determine which individuals will hold positions protected by the exceptional provisions of article 2.2 of the collective agreement.

There is no suggestion that the position of either party is motivated by other than a good faith belief in the intended workings of the collective agreement. In fact it appears that the grievor's supervisor in the Montreal Call Centre, Mr. Gary Dagostino, treated the grievor's position as in the call centre as remaining available to him, initially for a period of ninety days, and thereafter for further periods of extension. During that time he approached Mr. Lynch and effectively indicated to him that he must return to the call centre or risk losing his position, which could not be held indefinitely. When Mr. Lynch responded, apparently on more than one occasion, that he preferred to remain in the position of VIAnet Analyst for the duration of the project, Mr. Dagostino eventually posted his call centre position as vacant, and made a permanent assignment to another employee.

I turn to consider the merits of the competing positions. In doing so I note that the instant case does, as the Union suggests, resemble a dispute heard and disposed of earlier in this Office,

in **CROA 1908**. That award, which concerned Canadian Pacific Limited and the Transportation Communications Union, involved the claim of an employee who had left a "right of selection" position as Chief Clerk to work for a temporary period as a supervisor, to return to his position. While the specific language of the collective agreement in question was somewhat different, the relative rights of the parties in that case were indistinguishable from the case at hand. This Office there concluded that the employer could not prevent the employee from reverting to the position which he held prior to his temporary assignment outside the bargaining unit. In that regard it reasoned, in part, as follows:

The Arbitrator has difficulty with that submission. While the Company's position may be understandable insofar as it has a desire to fill Article 5 positions with the employees it feels to be best qualified, the contractual issue to be resolved is the right of the grievor under Article 21.8.3. That provision makes no exception for its application. It provides that an employee released from a position excluded from the bargaining unit "must revert" to the position from which he or she was promoted unless two exceptions are shown. The first exception is where the position has been abolished and the second is where the incumbent is senior to the returning employee. No exception is made in respect of whether the position last held is or is not an Article 5 "right of selection" position. The more compelling conclusion is that no further exception was intended for "right of selection" positions.

That conclusion is, moreover, also supportable on the basis of the overall scheme of the Collective Agreement. It is not disputed that once he was appointed to the Article 5 position of Chief Clerk at Revelstoke, assuming he had not been promoted and had continued to hold that post, the grievor could not have been removed at the discretion of the Company for other than disciplinary reasons. However, to support the Company's interpretation in the instant case and deny the grievor's right to return to the position from which he was promoted would have that very effect. I do not, in these circumstances, see how the Company can achieve indirectly what it could not have done directly but for Mr. Leslie's promotion out of the bargaining unit. Having been promoted to Chief Clerk Mr. Leslie had the right to hold that position free from removal at the Company's discretion, other than for reasons of discipline or clear incapacity. His right to return to that post as provided by Article 21.8.3 remains unqualified.

It may be noted that in that case the grievor had not in fact actively worked in the position of Chief Clerk, as he had been promoted out of the bargaining unit before he was able to assume his functions. The award nevertheless confirmed that he was entitled to undertake the position, subject to a satisfactory completion of the trial period allowed for under the collective agreement.

The instant case must, I think, turn on the interpretation of article 11.9 of the collective agreement. To be sure, its terms must be construed within the greater context of the collective agreement, and in a manner rationally consistent with the provisions of article 2.2. Significantly, article 2.2 does not deal with the issue of an employee seeking to exercise rights to return to a position protected by that article. As the Union representative stresses, it deals expressly with only one matter: the filling of "an opening" in one of the designated

classifications. In other words, article 2.2 speaks to the method by which the Corporation may fill a vacancy in a right of selection position. It does not, by any express terms, deal with whether persons holding a position in a designated classification are immune from displacement by another employee properly exercising seniority rights under the terms of the collective agreement. Nor does it speak to such rights as may be exercised upon return by an individual temporarily promoted out of a classification specified in article 2.2, the situation at hand.

The Arbitrator is inclined to agree with the Corporation that article 11.9 must be read so as not to frustrate the intent and purpose of article 2.2. The obvious purpose of the latter article is to ensure that the Corporation can staff "right of selection" positions with individuals, of its own choosing. On that basis it is difficult to see how the parties could have contemplated that an individual never selected to an article 2.2 position could exercise his or her seniority to bump into such a position by the operation of article 11.9. The instant case does not challenge those interests of the employer, however. On the material before me it is clear that the Corporation has already exercised its right of appointment to place Mr. Lynch into a position under article 2.2. To interpret article 11.9 to allow an individual in his particular circumstances to exercise his seniority to return to such a position does not offend the purpose of the article. On that basis I am satisfied that the position of the Union is correct, at least in part. While I would consider it doubtful that any employee could exercise his or her seniority to displace into an article 2.2 position (a matter which does not arise on the facts of the instant and upon which I make no conclusive determination) I am satisfied that article 11.9 can fairly be interpreted to allow an individual who has been promoted out of an article 2.2 on a temporary basis, to better serve Corporation in some higher function, to exercise his or her seniority under article 11.9 to return to the original classification to which he or she was originally appointed by the Corporation under the discretionary provisions of article 2.2.

Does the above interpretation of these provisions undermine the protection of the Corporation contemplated within article 2.2 of the collective agreement? I think not. It does not appear substantially debatable that once an employee has been assigned under the provisions of article 2.2 he or she enjoys all other rights under the collective agreement, including normal protections against removal from their position for other than valid and demonstrable reasons (see, e.g., **CROA 3058**). It must be assumed, in the instant case, that the Corporation properly exercised its initial discretion to assign Mr. Lynch to the classification of Senior Telephone Sales Agent. Nor is there any suggestion in the material before me that he is not qualified for that job. It is therefore difficult to see how his exercise of seniority to return to that classification could be said to undermine the legitimate interests of the Corporation.

Upon a careful review of the language of the provisions in question, taken in the overall context of the collective agreement, the Arbitrator is satisfied that the position argued by the Union is to be preferred. The grievance is therefore allowed. The Arbitrator directs that the grievor be reinstated forthwith into such position as Senior Telephone Sales Agent as his seniority may obtain, with compensation for all wages and benefits lost. Should there be any dispute as to the amount of compensation, or any other aspect of the interpretation or implementation of this award the matter may be spoken to.

January 15, 2001

MICHEL G. PICHER
ARBITRATOR