CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3243

Heard in Montreal, Wednesday, 13 February, 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. R. Clark.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor, on bulletin no. 15-97, bid the position of Ballast Regulator on the BC Ballast Gang and the position of Plasser Stabilizer on the BC Curve Tie Gang. The Company awarded the two positions to Messrs. G. Kinakin and H. Trudeau. The grievor was senior to both of the successful applicants. A grievance was filed.

The Union contends that by taking the actions that it did, the Company violated sections 13.12, and Appendix B-17 of Agreement No. 41.

The Union requests that the Company be ordered to compensate the grievor for all wages (both regular and overtime) and expenses lost as a result of this matter. The Brotherhood also requests that the grievor be given a Group I seniority date greater than that of Messrs. Kinakin and Trudeau. Finally, the Brotherhood requests that the Company be ordered to provide the grievor with any and all necessary training.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

E. J. MacIsaac	– Manager, Labour Relations, Calgary
D. Turner	– Manager, Track Programs

And on behalf of the Brotherhood:

P. P. Davidson	– Counsel, Ottawa
D. W. Brown	– General Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

At the arbitration the Brotherhood did not pursue the application of article 27.5. The issue, therefore, is reduced to the question of whether the Company has violated article 13.12 of the collective agreement, and the related Appendix B-17. Those provisions are as follows:

> **13.12** Employees shall be promoted in each of the departments as enumerated in Clauses 13.4 to 13.10, inclusive, on their respective seniority territories in order of seniority, provided they are qualified. Employees qualifying for foremen's positions must be able to read and write English or French.
>
> **Note:** See Understanding No. 7, Appendix C, and Appendix B-17.
>
> **Appendix B-17**
>
> This has reference to one of the Article III demands submitted by the Brotherhood of Maintenance of Way Employees concerning the appointment of an employee to a position he/she "can be qualified for in a reasonable period of time".
>
> During negotiations the Union expressed concerns that, in instances, the Company is not choosing senior employees who already possess some of the qualifications required for a particular position or could in a reasonable amount of time be qualified.
>
> In resolving this issue we undertook to remind you to appoint, where practicable, the senior employee in the manner outlined above.
>
> Would you, therefore, please see that this matter is brought to the attention of all supervisors and that every effort is made to consider senior employees when filling such vacancies.
>
> (signed) L. J. Waddell
> Manager, Labour Relations

The facts are not in dispute. In August of 1997 the Company issued bulletin 97-08 which referred to a number of positions, including the position of Ballast Regulator Operator on the BC Ballast Crew as well as Plasser Stabilizer Operator on the BC Curve Tie Gang. The grievor applied for the positions in question, which involved work in the classification of Group I Machine Operator. It is common ground that the grievor was a Group II Machine Operator at the time, although he was the senior applicant for the job postings. It is common ground that the machines previously operated by the grievor were within the Group II category and that he had not had direct experience operating either ballast regulator or a Plasser stabilizer. It is also common ground that the two incumbents who succeeded in obtaining the bulletined positions did have some prior experience on the machines in question, although they were not classified as Group I machine operators. Both of them were, however, junior to the grievor Mr. Clark. The substance of the dispute is whether, as the Brotherhood alleges, the grievor could have been trained on the equipment and therefore become qualified in a reasonable period of time, within the contemplation of Appendix B-17 of the collective agreement.

The Company's representative submits that it was not "practicable" within the meaning of the Appendix for the grievor to be promoted in the circumstances which then obtained. He argues that the work in question concerned what was contemplated to be a six week assignment, although it is conceded that the work in question did continue somewhat longer than anticipated. The Company maintains that to have expended the time necessary to train the grievor the Company would have incurred inefficiencies in productivity, with the time devoted to training Mr. Clark being beyond the range of what would be reasonably practicable. Part of the Company's submission is also to the effect that there would have been further dislocation in that if the grievor had received the promotion the position which he occupied in category II would have had to be filled by someone else.

The Brotherhood maintains that the burden upon the employer would not have been unreasonable in the circumstances. In that regard it refers the Arbitrator a document of the Company's own policies which concerns "Employee Qualification & Familiarization Times". That document establishes times which are expected to be taken in either the original training of a machine operator, or the retraining of an operator with prior experience who might be in need of a re-familiarization period. Under the terms of that policy the training time estimated for a new operator on a track stabilizer is sixty hours, and on ballast regulators it is estimated at eighty hours. The policy includes the following notation:

Note: All times shown are actual operating hours.

The representatives of the Brotherhood maintain that it would not have been overly burdensome for the Company to allow the grievor to be initially trained as part of his assignment to the six weeks of work as an operator of either the ballast regulator or the Plasser stabilizer. The Brotherhood's submission is based, in part, on its view that the hours contemplated within the Company's own policy are not necessarily actual operating time or "stick time" at the controls of either machine. Upon a closer examination of the material, however, the Arbitrator is compelled to agree with the submission of the Company, which is that it is actual operating time which is estimated to be necessary for a person to become qualified as an operator of the equipment in question.

It does not appear disputed that in any work assignment involving the equipment here at issue there would be a certain amount of down time, for various reasons. In that circumstance it is less than clear, on the evidence before me, how many actual days would be required before a person in the position of the grievor would achieve either eighty hours or sixty hours of actual operating time on either machine. It is not unreasonable to conclude, however, that in the case of the ballast regulator it would require more than two weeks of work to achieve the necessary operating time, and that the operating time at the controls of a track stabilizer necessary for qualification would amount to something more than a week and one-half.

In approaching this grievance the Arbitrator accepts the general position of principle argued by the Brotherhood. The Company could not have rejected the grievor on the basis that he had never previously operated the equipment, and was therefore not qualified. Nor is the necessity to replace him in his prior position a compelling factor. The provisions of a collective agreement must be taken to have some meaning, and the decision of the parties to include Appendix B-17 within the text of their collective agreement must be taken to reflect their understanding, and the undertaking of the Company, that persons who are qualifiable within a reasonable period of time are entitled to be promoted on the basis of their seniority, where it is practicable to allow them to gain that qualification. In the case at hand if the bulletin had been for a more extensive period of time, as might be the case for example at the commencement of a work season, the Arbitrator would have some difficulty agreeing with the Company that the opportunity for a reasonable period of training would then be impracticable in the case of an applicant such as the grievor.

The instant case, however, does raise different issues with respect to the question of practicability. It is not disputed that the work in question was originally contemplated to be scheduled between September 27 and November 6 of 1997. The Company was entitled to expect that the persons operating the Category I equipment during that period of time would be able to do so in a way that would allow for reasonable productivity and efficiency. However, as appears from the material before the Arbitrator, it would not be unreasonable to conclude that it might have taken the grievor between two and four weeks on either piece of equipment before he attained what the Company has established as a sufficient degree of operating experience to constitute basic qualification. In that regard it should be stressed that there is no suggestion in the argument before me that the standards established within the Company's policies are unrealistic or unreasonable.

In the result, I am compelled to agree with the employer that, in the special circumstances of the case at hand, it was impracticable to contemplate promoting the grievor into a position of operator of either machine for what was contemplated to be a six period of work. Fully half or more of that time would have been involved in his gaining training and familiarity on the equipment, during which time he would in all likelihood not be able to operate at normal levels of efficiency and productivity. As noted above, it should be stressed that that same conclusion might not obtain had the work period in question been more substantial.

For the foregoing reasons the Arbitrator is compelled to conclude that the grievor could not, with respect to the work which was the subject of bulletin 97-08, have been qualified within a reasonable time that would satisfy the condition of practicability contemplated within Appendix B-17 of the collective agreement. For these reasons the grievance must be dismissed.

February 15, 2002

(signed) MICHEL G. PICHER
ARBITRATOR