CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3265

Heard in Montreal, Tuesday, 11 June, 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

The parties are in disagreement as to the proper calculation of the seniority date of a Mr. T. Bryenton.

EX PARTE STATEMENT OF ISSUE:

Mr. Bryenton was promoted out of the bargaining unit into an official or excepted position on July 25, 1994. In November of 2000, Mr. Bryenton was released from his official or excepted position and he exercised his seniority to obtain a position in the bargaining unit. At this time the Company awarded to Mr. Bryenton and permitted him to use for the purposes of exercising his seniority, a seniority date of August 16, 1969. This seniority date did not take into account the six plus years that Bryenton had been holding an official or excepted position.

It is the Union's contention that Mr. Bryenton stopped accumulating seniority effective June 30, 1996, as stipulated in Article 11.9(a)(i) of Agreement 5.1 which reads as follows:

> The name of employees holding seniority under this agreement who were:
>
> **(i)** filling permanent official or excepted positions with the Company, or its subsidiaries, prior to June 14, 1995, will be continued on the seniority list and shall continue to accumulate seniority until June 30, 1996. Following this period, such employee shall no longer accumulate seniority but shall retain the seniority rights already accumulated up to June 30, 1996.

The Union also maintains that Article 11.5 prohibited any changes to Mr. Bryenton's seniority date once such had been posted on four consecutive seniority lists.

The Union requests in resolution of this matter that Mr. Bryenton's seniority be adjusted to reflect the fact that he no longer accumulated seniority after June 30, 1996 until the point he returned to the bargaining unit in November of 2000. We also request that any employee adversely affected, as a result of the Company permitting Mr. Bryenton to utilize an improper seniority date, be made whole.

It is the Company's position that Mr. Bryenton was temporarily promoted for all the time that he was out of the bargaining unit and therefore in accordance with article 11.9(a)(iii) he continued to accumulate seniority at all times. Article 11.9(a)(iii) reads as follows:

> **(iii)** who are temporarily promoted to an official or excepted position will continue to accumulate seniority during the period of time they are temporarily promoted.

The Company requests therefore that the Arbitrator rule that the Company has calculated Mr. Bryenton's seniority correctly.

FOR THE UNION:

(SGD.) J. R. MOORE-GOUGH
NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

Ron Campbell	– Manager, Human Resources, Winnipeg
D. S. Fisher	– Director, Labour Relations, Montreal
C. Joannis	– Manager, Labour Relations, Montreal

And on behalf of the Union:

J. R. Moore-Gough	– National Representative, Chatham

AWARD OF THE ARBITRATOR

The Company raises a preliminary objection to the pleading of article 11.5 by the Union. It maintains that that article was not raised at the third step of the grievance procedure, and is therefore not properly before the Arbitrator in these proceedings. The article in question reads as follows:

> **11.5** No change shall be made in the seniority date accredited an employee which has appeared on four consecutive seniority lists unless the seniority date appearing on such lists was protected in writing with the 60-calendar-day period allowed for correctional purposes. Names which have not appeared on four consecutive lists shall not be restored to such seniority lists except in accordance with paragraph 11.13 or by agreement with the designated National Representative of the Union.

The Company relies on the provisions of article 24 of the collective agreement which govern the discipline and grievance procedure. Article 24.5 describes the three steps to be followed in the progressing of a grievance. That portion of the article relating to step three reads as follows:

> **24.5** Any complaint raised by employees concerning the interpretation, application or alleged violation of this agreement shall be dealt with in the following manner; this shall also apply to employees who believe that they have been unjustly dealt with:
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> …
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> **Step 3**
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> Within forty-five (45) calendar days of receiving decision under Step 2, the Designated National Representative of the Union may appeal to the:
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> Senior Vice-President, Eastern Canada
>
> Senior Vice-President, Western Canada
>
> Senior System Functional Officer, System
>
> NOTE: Each party will notify the other of any changes in designated officers.
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> A decision will be rendered within forty-five (45) calendar days of receiving appeal. The appeal shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of the collective agreement, **the statement shall identify the article and paragraph of the article involved.**
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> (emphasis added)

In the circumstances of this case the Arbitrator is compelled to agree with the objection of the Company. It is true, as the Union submits, that as a general rule it is appropriate for a bargaining agent to refer to a general article which has been violated, and that to do so would normally comply with the requirements of step 3 as provided under article 24.5 of the collective agreement. The Union might then properly submit other paragraphs of the article as evidence of collateral aspects of the Company's alleged violation. That would not be the case, however, where, as

here, the Union seeks to advance the operation of an article as a freestanding and separate substantive basis for the success of the grievance. In the case at hand, notwithstanding the substantive provisions of the articles of the collective agreement governing seniority, including article 11.9(a)(i), the Union raises the entirely different substantive right and obligation provided under article 11.5, a matter not raised at step 3 of the grievance procedure. In considering that issue, the Arbitrator considers it significant that article 24.5 expressly stipulates, with the use of the mandatory word "shall" that the Union is to specify "… the article and paragraph of the article involved."

It seems evident to the Arbitrator that the parties thereby intended to ensure that, at the final step of the grievance process, both parties would be on the same page with respect to any issue which might ultimately be pleaded at arbitration, in the event that they remained at impasse with respect to the merits of their dispute. In the instant case, where paragraph 5 of article 11 is first raised at the filing of the Union's statement of issue, there is an obvious departure from the requirement of article 24.5, to the extent that the article raised constitutes a separate and independent allegation which, standing alone, would arguably cause the grievance to succeed. In other words, what is raised in that circumstance is a different grievance. In the circumstances I am satisfied that the Company is correct in its assertion that to allow the Union to proceed with its claim under article 11.5 would be an improper expansion or amendment of the grievance beyond the intention of article 24.5. On that basis the Arbitrator sustains the preliminary objection of the Company and strikes from consideration the alleged application of article 11.5 in the circumstances of this case.

Alternatively, had the preliminary objection not been sustained, the Arbitrator would have some difficulty in applying the interpretation of the article which is sought by the Union in these proceedings. If, as the Company alleges, the seniority of Mr. Bryenton was misstated on seniority lists by virtue of a repeated clerical error, the Union's representative himself acknowledges that the bargaining agent's duty of fair representation would not allow the first sentence of article 11.5 to effectively wipe out an individual's otherwise legitimate seniority rights (see **CROA 1413**).

I turn to consider the merits of the grievance. In doing so the Arbitrator appreciates the Union concerns which motivate this dispute. It does not appear challenged that when Mr. Bryenton left the ranks of the bargaining unit on July 25, 1994 no documentation was provided to the Union with respect to the nature of what the Company characterizes as his temporary promotion, either with respect to the nature of his duties or their anticipated duration. Nor did the Company, prior to the actual hearing of this matter at arbitration, give to the Union's representative the documentation which would support the position advanced by the Company. While it may be true that there was no strict obligation on the part of the employer to provide such documentation, it appears at least arguable that this dispute may have been avoided had there been a somewhat more open sharing of information, at least at the latter stages of the grievance process.

The issue is whether the assignment of Mr. Bryenton to management functions between July 25, 1994 and November 24, 2000 constitutes a temporary promotion within the contemplation of the collective agreement. The dispute therefore involves the application of article 11.9(a) which provides as follows:

> **11.9 (a)** The name of employees holding seniority under this Agreement who were
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> **(i)** filling permanent official or excepted positions with the Company, or its subsidiaries, prior to June 14, 1995, will be continue on the seniority list and shall continue to accumulate seniority until June 30, 1996. Following this period, such employees shall no longer accumulate seniority but shall retain the seniority rights already accumulated up to June 30, 1996.
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> **(ii)** who, on or after June 14, 1995, will fill permanent official or excepted positions with the Company, or its subsidiaries, will be continued on the seniority list and shall continue to accumulate seniority for a period of one year after the date of appointment. Following this period, such employee shall no longer accumulate seniority but shall retain the seniority rights already accumulated.
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> **(iii)** who are temporarily promoted to an official or excepted position will continue to accumulate seniority during the period for time they are temporarily promoted.

The Union submits that Mr. Bryenton stopped accumulating seniority effective June 30, 1996 as provided under sub-paragraph (i) of article 11.9(a). Its representative maintains that the seniority postings made by the Company during the period in question repeatedly referred to Mr. Bryenton as holding a permanent supervisory position. As

touched upon above, the Company disputes that characterization. It maintains that although Mr. Bryenton was referred to on published seniority lists as occupying a permanent supervisory position, those lists entries were made by clerical or administrative error, and that in substance there was no question, from the outset, that Mr. Bryenton was promoted to and at all time occupied a temporary promotion within the contemplation of sub-paragraph (iii) of article 11.9(a).

The Union relies, in substantial part, on an award of Arbitrator Weatherill in **SHP 78**, a dispute between Canadian Pacific Limited and Division No. 4, Railway Employees Department, AFL-CIO. In that award, which concerned the return to the bargaining unit of Machinist A. Gauthier from his promotion to the position of assistant foreman in the maintenance department, the Arbitrator sustained the Union's position with respect to the alleged misapplication of Mr. Gauthier's seniority upon returning to his craft. Specifically, Arbitrator Weatherill found that the evidence did not establish the conditions of a temporary appointment. In that regard he stated, in part:

> While the Company may have considered this a "temporary" appointment, it was in fact of indefinite duration. It was not "temporary" in the sense of having a fixed, or even a "brief" term.
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> There is nothing in the collective agreement by way of explicit definition of a "temporary" appointment to an excluded position, and in my view the fact of the matter is simply that Mr. Gauthier was appointed Assistant Foreman, the Company hoping that one day the backlog of work would disappear, and with it the need for the appointment.

The Arbitrator takes no issue with the principles so stated by Arbitrator Weatherill. It is also clear, however, that each case must be determined on its own specific facts, when regard is had to whether a given promotion can fairly be characterized as temporary for the purposes of any collective agreement.

In the case at hand the Company has adduced evidence which, I am satisfied, does confirm that from the outset, and throughout its duration, Mr. Bryenton's promotion was intended to be, and continued to be, temporary.

The primary evidence of the status of Mr. Bryenton at the time of his transfer into supervisory work is reflected in an e-mail dated January 6, 1995. It specifies the purpose for which Mr. Bryenton was promoted, namely to become responsible for the training of employees in the introduction of the Company's new Service Reliability Strategy System (SRS). That letter reads, in part, as follows:

> As a Service Reliability Strategy Representative, your contribution and commitment to the SRS project is critical to its success. As a new member of this SRS Team, the conditions under which you have been recruited, as well as the length of time you can expect to be with the team, have already been discussed with you. This letter will serve to confirm our mutual understanding of these conditions.
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> …
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> Reintegration Upon Completion of Project
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> Once the project is completed, you will revert to your former unionized status. Every effort will be made to ensure a smooth transition, however, as a scheduled employee, you may be required to displace under the terms of your Collective Agreement. This should be discussed with your current supervisor.

In addition to the terms of the above letter of understanding, the Company adduced its own internal records of employee personnel data maintained with respect to various training assignments occupied by Mr. Bryenton in several locations between 1994 and 2000. The codes utilized with respect to that date consistently reflect the employee as being on a temporary assignment. While the Company's own internal documentation and codes would not necessarily be determinative of the merits of the issue, these entries do confirm the ongoing understanding, reflected in the initial letter referred to above, that the sole reason for Mr. Bryenton's promotion was to be involved in the initiation and training of employees in the Company's new SRS system. The roll out of the SRS project, in the end, involved his working at a number of locations over relatively extended periods of time. There was, from the outset, a clear understanding that his promotion was temporary, and directly tied to the duration of the SRS training initiative. While the precise date at which that program would be complete could not be predicted in 1994, it appears undeniable that at all times the Company and the employee concerned knew that his promotion was tied to the duration of that roll out program. His promotion was specifically tied to the project, at the completion of which he was to return to the bargaining unit. That is in fact what happened.

The Arbitrator is satisfied that in these circumstances the facts do not disclose the kind of promotion for an indefinite period of time contemplated in the remarks of Arbitrator Weatherill in **SHP 78**. The duration of Mr. Bryenton's promotion was specific to the duration of the project to which he was assigned. It is clear that that project was finite, and was conceived as finite from the beginning. The fact that it may have extended over a period of several years does not change the nature of the promotion which he received.

It may be noted that the language of article 11.9(a)(iii) has since been amended. As the provision now stands, subsequent to April 1, 2001, an individual temporarily promoted to a non-scheduled or excepted position cannot continue to accumulate seniority beyond a capped period of time of twenty-four months. Under the new provision a situation such as Mr. Bryenton's could not, therefore, be repeated.

For all of the foregoing reasons the Arbitrator is satisfied, on the basis of the evidence filed, that Mr. Bryenton did at all material times occupy a temporary promotion within the meaning of article 11.9(a) of the collective agreement as it applied at the material time. The grievance must, therefore, be dismissed.

June 14, 2002

(signed) MICHEL G. PICHER
ARBITRATOR