CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3360

Heard in Edmonton, Thursday, 10 July 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE – UNION:

The alleged violation of articles 11.9 and 12.1 of agreement 5.1 when the Company temporarily filled the vacancy created by the departure of Mr. S. Linnick, as a result of his promotion to an official or excepted position, and permitted or required Mr. Linnick to return to his previous bargaining unit position upon the expiration of his promotion.

UNION'S STATEMENT OF ISSUE:

On or about September 9, 2001, Mr. S. Linnick was temporarily promoted to an official or excepted position. The Company temporarily filled, under the provisions of article 12.6, the bargaining unit position vacated by Mr. Linnick as a result of his promotion. Upon Mr. Linnick's release from his official or excepted position on or about April 30, 2002, he was permitted or required to return to the position he had previously held in the bargaining unit.

It is the Union's contention that since Mr. Linnick was promoted for one hundred and twenty (120) days or more that he was required to exercise his seniority rights to any position in his seniority group for which he is qualified in order to return to the bargaining unit upon his release from his official or excepted position. It is further the Union's position that the bargaining unit position vacated by Mr. Linnick should have been posted in accordance with the provisions of article 12.1 of agreement 5.1.

The Union requests in settlement of this matter a declaration that the Company violated the provisions of articles 11.9 and 12.1 of agreement 5.1 when they temporarily filled the bargaining unit position vacated by Mr. Linnick and permitted or required him to return to said position upon release from his official or excepted position. The Union further requests that the Company be directed to properly abide by the provisions of articles 11.9 and 12.1 in the future when individuals are promoted for one hundred and twenty (120) days or more or in the case of Maternity or Child Card Leave for one hundred and eighty (180) days or more.

It is the Company's contention that the collective agreement is silent on how to fill vacancies created by the promotion of individuals to official or excepted positions of one hundred and twenty (120) days or more or in the case of Maternity or Child Card Leave for one hundred and eighty (180) days or more. As such, in the Company's view, management is free to determine how they will fill such vacancies as long as such management rights are exercised in a reasonable manner. The Company requests that the Arbitrator therefore dismiss the Union's grievance.

DISPUTE – COMPANY:

The alleged violation of article 11.9(b) of agreement 5.1 when the Company temporarily filled the vacancy created by the departure of Mr. S. Linnick, as a result of his temporary promotion to an official or excepted position, and permitted or required Mr. Linnick to return to his previous bargaining unit position upon the expiration of his promotion.

COMPANY'S STATEMENT OF ISSUE:

On or about September 9, 2001, Mr. S. Linnick was temporarily promoted to an official or excepted position. The Company temporarily filled, under the provisions of article 12.6, the bargaining unit position vacated by Mr.

Linnick as a result of his promotion. Upon Mr. Linnick's release from his official or excepted position on or about April 30, 2002, he was permitted or required to return to the position he had previously held in the bargaining unit.

It is the Union's contention that since Mr. Linnick was promoted for one hundred and twenty (120) days or more that under article 11.9(b) he was required to exercise his seniority rights to any position in his seniority group for which he is qualified in order to return to the bargaining unit upon his release from his official or excepted position. It is further the Union's position that the bargaining unit position vacated by Mr. Linnick pursuant to article 11.9(b) should have been posted in accordance with the provisions of article 12.1 of agreement 5.1 instead of article 12.6.

The Union requests in settlement of this matter a declaration that the Company violated the provisions of article 11.9 of agreement 5.1 when they temporarily filled the bargaining unit position vacated by Mr. Linnick utilizing article 12.6 and permitted or required him to return to said position upon release from his official or excepted position. The Union further requests that the Company be directed to properly abide by the provisions of articles 11.9 in the future when individuals are promoted for one hundred and twenty (120) days or more or in the case of Maternity or Child Card Leave for one hundred and eighty (180) days or more.

It is the Company's contention that the collective agreement article 12.6 is the proper provision when it becomes necessary to fill temporary vacancies created by the temporary promotion of individuals to official or excepted positions of one hundred and twenty (120) days or more or in the case of Maternity or Child Card Leave for one hundred and eighty (180) days or more. The Company requests that the Arbitrator therefore dismiss the Union's grievance alleging a violation of article 11.9.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. MOORE-GOUGH	**(SGD.) C. JOANIS**
FOR: PRESIDENT, COUNCIL 4000	**FOR: VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

S. MacDougald	– Manager, Labour Relations – Training, Montreal
L. Thurlbeck	– System Director, Supply Management Operations, Edmonton

And on behalf of the Union:

J. Moore-Gough	– National Representative, Chatham
R. Johnston	– President, Council 4000, Montreal
B. McDonagh	– National Representative, Vancouver
B. Kennedy	– Representative, Council 4000, Edmonton
M. Wozniac	– President, Local 4001, Edmonton

AWARD OF THE ARBITRATOR

At issue in this grievance is the convergence of articles 11.19(b) and 12.6 of the collective agreement. It arises by reason of the Union's claim that upon the return of Mr. S. Linnick to the bargaining unit from a temporary management assignment he should have been compelled to exercise his seniority to displace a junior employee, and the Company should have posted his former bargaining unit position as a vacancy in accordance with the provisions of article 12.1 of the collective agreement.

The Company raises a preliminary objection, arguing that the Union did not properly place the provisions of article 12.1 of the collective agreement in issue during the course of the grievance procedure. On that basis it's representative maintains that the Union cannot assert the application of that article for the first time within the text of it's *ex parte* statement of issue.

The Arbitrator cannot sustain that preliminary objection. It is well settled, as a matter of law, that boards of arbitration should avoid undue technicality in resolving issues concerning the drafting of grievance documents, and should deal, insofar as possible, with the substance of the parties' dispute. (See **Blouin Drywall Contractors Ltd.** (1973) 4 L.A.C. (2d) 254 (O'Shea), affirmed on judicial review 57 D.L.R. (3d) 199 (Ont. C.A.)). In the case at hand there is no dispute that the issue of posting regionally the bargaining unit position vacated by Mr. Linnick was clearly raised during the course of grievance correspondence. To that effect the Union's representative draws to the Arbitrator's attention a letter dated January 31, 2002 addressed to the Company by the Union's regional bargaining representative, Mr. Rick Doherty. On more than one occasion during the course of that letter Mr. Doherty adverts to

the Union's stance that the position of Mr. Linnick should be posted on a regional bulletin, as Mr. Linnick had been absent from that position for more than 120 days, as contemplated under article 11.9 of the collective agreement. The penultimate paragraph of that letter clearly states: "The Union requests the permanent position formerly owned by Brother Linnick be posted on a regional bulletin immediately."

Against that background there is no surprise or prejudice to the Company in the framing of the Union's statement of issue alleging, in part, that the Company "should have … posted in accordance with the provisions of article 12.1 …". In matters of such collective bargaining importance substance must prevail over form. I am satisfied that the issue of the application of article 12.1 was clearly advanced by the Union during the course of the grievance. There has, in my view, been substantial compliance with the requirements of article 24.5 of the collective agreement which stipulates that at step 3 of the grievance procedure the Union must identify the provision of the collective agreement in issue. While it may arguably have been done more clearly by expressly stipulating the number of the article in question, the clear reference by the Union to what it alleged to be the failure of the Company to post regionally was not in doubt. This is not a case where the Union seeks, at the last minute in the text of the statement of issue, to insert an entirely new substantive issue not previously dealt with, as was found to be improper and contrary to article 24.5 in **CROA 3265**. Nor is the precise citation of the number of a specific article in all cases a *sine qua non* to its argument (see **CROA 2891**). In the instant case there was clearly no violation of article 24.5 in substance and no resulting unfairness or prejudice to the Company. On that basis the Company's preliminary objection must be dismissed.

As noted above, at issue are the provisions of articles 11.9(b) and 12.6 of the collective agreement. They read as follows:

> **11.9 (b)** When employees are released from such excepted employment, except at their own request or as provided in paragraph 12.19, such employees may exercise their seniority rights to any position in their seniority group which they are qualified to fill. They must make their 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, they shall forfeit their seniority and their names shall be removed from the seniority list.
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> **NOTE:** when an employee is temporarily promoted to an excepted position:
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> **(i)** for less than one hundred and eighty (180) deays by reason of the regular incumbent having elected Maternity or Child Care Leave, or
>
> **(ii)** for less than one hundred and twenty (120) days in all other cases,
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> such employee's position will be filled in accordance with paragraph 12.6. When released from excepted positions, employees must return to their regular assignments.
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> **12.6** Temporary assignments, when known to be for more than 30 working days' duration, will not be bulletined. However, suitable advice notice will be posted, as required at the terminal affected. Such assignments shall be awarded to the qualified senior employee at the terminal who makes application therefore within five calendar days from the date notice is posted. The advice notice shall contain an estimated duration of the temporary assignment. The successful applicant shall be permitted to assume the assignment within ten days from the date the advice notice is posted. Applications from regularly assigned employees may only be accepted when it is known the assignment is for more than 30 working days and when it involves an increase in rate of pay, or a change in shift, or rest day or days. When other qualified employees are available, regularly assigned employees will not be allowed to commence work on a temporary assignment and their permanent assignment on the same day. Should the temporary assignment go beyond its predicted duration, the Company will repost the advice notice.

In addition, the Company's representative refers the Arbitrator to the definition of "temporary vacancy" found within the collective agreement under article 1.4 which reads as follows:

> **Temporary Vacancy**
> **1.4** A vacancy in a position caused by the regularly assigned occupant being absent from duty (including on vacation but excluding pre-retirement vacation) or temporary assignment to other duties.

It is important to define the issue in this dispute. The Union's position is that upon the conclusion of Mr. Linnick's temporary service in the excepted position, which was well in excess of 120 days, his return to the bargaining unit must be in conformity with the procedures established under article 11.9(b) of the collective agreement. In other words, in the Union's submission, because he had been gone for more than 120 days he could not, as the Company maintains, automatically return to his previous regular assignment. The Union submits that he was obligated, under the terms of the first paragraph of article 11.9(b), to exercise his seniority to claim any position in his seniority group for which he was qualified. It does not appear disputed that in the case at hand there would have been no practical difference in the result. The position previously held by Mr. Linnick was occupied by a junior employee at the time of his return, and could have been claimed by following that procedure.

The Company's representative argues that the provisions of article 12.6, when read together with article 11.9(b) of the collective agreement, sustain the contrary view of the employer. He notes that a temporary assignment for more than 30 working days' duration can be extended, at times for considerable periods extending to more than a year, without any obligation on the Company to bulletin the position. He stresses that the provisions of article 12.6 specifically contemplate the extension of a temporary assignment beyond its predicted duration, and the ability of the Company to extend such an assignment by re-posting the advice notice at the terminal concerned, as contemplated within that article.

While the Arbitrator agrees with certain aspects of the Company's submission, I find it difficult to sustain it's argument with respect to the options available to Mr. Linnick upon his return to the bargaining unit. I must agree with the Company's position, to the extent it would deny the suggestion found in the grievance correspondence of the Union to the effect that it had an obligation to post a permanent vacancy in the position previously held by Mr. Linnick after the expiry of 120 days. The collective agreement definition of temporary vacancy clearly contemplates such a vacancy to exist during the absence of the regularly assigned occupant of a position. That definition stands without any reference to the duration of the absence. Additionally, article 12.6 contemplates the extension of a temporary assignment beyond it's duration by the re-posting of the advice notice. That remains a prerogative of the Company.

Different considerations arose, however, when Mr. Linnick's excepted position outside the bargaining unit came to an end. The only clear language placed before the Arbitrator addressing the rights and obligations of Mr. Linnick at that time are those contained within article 11.9(b). In the Arbitrator's view there is no apparent conflict between the provisions of the first paragraph of that article and those of the Note appended to it. The general rule, expressed in the first paragraph of the article, is that employees released from their excepted employment "may exercise their seniority rights to any position in their seniority group which they are qualified." The Note, however, speaks more specifically to an individual who has been in an excepted position for less than 120 days. It is in that more narrow context that the following sentence appears: "When released from excepted positions, employees **must** return to their regular assignments." (emphasis added)

The Arbitrator has difficulty grasping the employer's reading of these provisions. It is difficult to reconcile how an employee in the circumstances of Mr. Linnick might, on the one hand, have the choice to exercise seniority to any position in their seniority group, while at the same time being under the obligation that they "must" return to their regular assignment. I see no contradiction in these provisions. They clearly contemplate different situations.

In the Arbitrator's view the obligation to return to an employee's regular assignment is strictly limited to those circumstances delineated within the Note. In the case of Mr. Linnick, he could only return to his original regular assignment under the mandatory provisions of sub-paragraph (ii) of the Note if he had been temporarily promoted to an excepted position for less than 120 days. That is clearly not what occurred, and the Arbitrator can see no basis upon which the language of that provision can be brought to bear in his case. The fact that the Company retained the ability to maintain a temporary assignment in his former position under article 12.6, or treat that position as a temporary vacancy for the duration of his absence, has no direct bearing on the rights and obligations of Mr. Linnick at the time of his return to the bargaining unit. However, when he did return it is clear that the Company took the view that he assumed his former position as a permanent assignment, and no longer as a temporary assignment within the terms of article 12.6. For the reasons touched upon above, I am satisfied that, he could not re-enter that position via that route. In the result, if the Company wished to restore the position to a permanent basis it was then compelled to post the vacancy in accordance with article 12.1 of the collective agreement.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Company did misapply the provisions of article 11.9 of the collective agreement, and violated the provisions of article 12.1 of the

collective agreement when it permitted Mr. Linnick to return to his prior position upon release from his excepted position. At that point in time Mr. Linnick was compelled to exercise his seniority in accordance with article 11.9 of the collective agreement, and if the Company chose to treat his previous position as permanent, it was then compelled to post it as a vacancy in accordance with article 12.1 of the collective agreement.

July 18, 2003

(signed) MICHEL G. PICHER
ARBITRATOR