CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3364

Heard in Montreal, Wednesday, 10 September 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Durée d'une pénurie temporaire de personnel et droits d'ancienneté.

UNION'S STATEMENT OF ISSUE:

Le 19 décembre 2002, tous les employés disponibles furent avisés de se présenter à Toronto afin d'y combler une pénurie de personnel.

S'y étant présentés à compter du 6 janvier 2003, les employés forcés conformément aux dispositions du paragraphe 91.11 d), Article 91 de la Convention 4.16, demandèrent :

- D'être libérés au changement d'horaire du printemps 2003, c'est-à-dire le dernier dimanche d'avril;
- Par ailleurs, le droit, entre les changements d'horaire, de faire valoir leur ancienneté pour les postes permanents vacants dans leur ancien ou nouveau district d'ancienneté; et
- Enfin le droit de faire valoir leur ancienneté pour les postes permanents vacants affichés au changement d'horaire du printemps 2003. Les deux demandes furent refusées.

Le Syndicat conteste le refus de la Compagnie car un employé forcé, au même titre qu'un employé qui a fait valoir son ancienneté, ne doit être tenu de combler une pénurie de personnel pour une durée de plus de six (6) mois et doit être autorisé à faire valoir son ancienneté autant entre qu'à l'un des deux changements d'horaire.

Le Syndicat maintient que divers articles de la Convention 6.16, notamment mais non limitativement, 47, 48, 54, 55, 91, 93 et 102 appuient le grief.

Le Syndicat sollicite pleine compensation engendrée par le refus de la compagnie d'accepter les demandes légitimes des employés ainsi que pour avoir été retenus contrairement aux dispositions de la convention collective.

La Compagnie rejette ces demandes.

FOR THE UNION:

(SGD.) R. LEBEL
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

D. Laurendeau	– Directeur – Ressources humaines, Montréal
B. Hogan	– Directeur – Planification de la Main d'Oeuvre, Toronto
B. Olson	– Premier Directeur – Ressources Humaines, Toronto
A. Durocher	– Superviseur – Centre de Gestion des Équipes
C. Gilbert	– Associée – Ressources Humaines, Montréal

And on behalf of the Union:

R. LeBel	– Président Général, Québec

[TRANSLATION]

W. G. Scarrow	– Vice-Président, Ottawa
J. Gagné	– Vice-Président Général
J. P. Paquette	– Représentant local,
N. Albert	– Vice-Président local,
M. J. Proulx	– Membre
C. Belzile	– Représentant local,

AWARD OF THE ARBITRATOR

The decision in **CROA 3328** confirmed that employees holding seniority in the former 18th & 19th Seniority Districts (Quebec and Atlantic Canada) who were occupying positions on the furlough board could be forced to cover a temporary shortage of employees at Toronto, in the former 17th Seniority District. It should be noted that after May 5, 1995, the 17th, 18th and 19th seniority districts became a single seniority district, known as the 20th Seniority District. In the result, a number of employees of the former districts 18 and 19 were forcibly transferred to Toronto.

The Union submits that to the extent that these employees retain their seniority rights in the 18th and 19th districts, they had the right to be released from their positions at Toronto at the change of timetable in the spring of 2003. The grievors also claim the right to be able to exercise their seniority on any permanent vacant positions posted in their former seniority district between the changes of timetable in the spring and fall. According to the Union, an employee forced, that is to say required to displace outside his or her former seniority district, should not be compelled to cover a shortage of staff outside his or her seniority district for more than six months. The Union's representative maintains that the employees who were forced could in fact exercise their seniority in their original seniority district both between and at the time of the two changes of timetable. The Union maintains that in this case the Company's sustained refusal to accept the requests of employees to exercise their seniority to return to their original district, whether on the occasion of the posting of a vacant position or at the change of timetable, violates the rights of the employees, on behalf of whom it seeks a remedial declaration as well as monetary compensation.

The Company denies violating the provisions of the collective agreement. According to it's representative, firstly the Company recognizes that the employees who are held in service at the terminal to which they were forced can apply on postings in the consolidated seniority district, that is to say the 20th district. However, the Company maintains that articles 47, 48, 54, 55, 91 and 93, as wells as appendices 90, 93, 94 and 104 of the collective agreement do not give the rights and privileges claimed by the Union in this grievance.

According to the Company the limit of six months of service in an external terminal applies only to employees who have obtained such work voluntarily by exercising their seniority. However, an employee who is forcibly transferred to an external terminal within the 20th district does not have the same right. The employer relies, in part, on the following provisions:

> **49.37** Employees exercising seniority to a temporary shortage shall not be required to protect the shortage beyond 6 months from the date that the employee arrives at the shortage location.
>
> **91.11 (This paragraph and sub-paragraphs (a) to (e) inclusive are only applicable to the 20th Seniority District)**. When their services are required elsewhere on the seniority district (for the former seniority district for employees who enjoy preference rights pursuant to Addendum No. 54, employees on the furlough board will be required to respond in accordance with the following conditions.
>
> **(a)** Employees with a seniority date on or prior to March 17, 1982 will not be required to protect service elsewhere on the seniority district.
>
> **(b)** Employees on the furlough board will only be required to protect service elsewhere after the provisions of Article 55 have been exhausted.
>
> **(c)** When it is necessary to utilize employees on the furlough board to protect service elsewhere, employees will be obtained from the closest terminal (by rail) to the point of shortage where there are employees occupying positions on the furlough board.
>
> **(d)** The junior employee from such closest terminal will be required to protect such service whether or not he or she is occupying a position on the furlough board. Employees failing to

report at the expiration of 7 days will, thereafter, no longer be entitled to the guarantee. At the expiration of 15 days, such employees will forfeit all seniority rights and their services will be dispensed with unless able to give a satisfactory reason, in writing, to account for their failure to report.

(e) The provisions of Article 72 shall apply to all employee required to protect service elsewhere in accordance with this provision.

(original emphasis)

The Company stresses the fact that the employee forced to Toronto is not permanently barred from his or her original home terminal. It stresses that there are three possibilities by which that employee can return: firstly, he or she may bid on a posted vacancy at their original terminal when that vacancy is posted across the 20th district; secondly, he or she may be recalled to their former terminal if there is a shortage of employees at that location; thirdly, he or she may be laid off at Toronto.

In response, the Union's representative argues that the interpretation put forward by the Company has the effect of undermining seniority rights and causing negative consequences for the employees forced outside their former seniority district. For example, firstly an employee forced to Toronto from Joffre would be unable to apply for any local posting in his or her former terminal, or even within his or her former district, the 18th, whether it be at the changes of timetable or between changes, by reason of the operation of the restrictive provisions of article 48 of the collective agreement as it is applied by the Company. In the result, an employee forced to work in Toronto could find himself or herself deprived of access to a vacant position in his or her former terminal, a position which might well be assigned to a junior employee, because the vacancy in the former terminal is deemed by the Company to be available only to employees who remain at that location, and not to all employees who have seniority at that location.

Secondly, the Union's representative maintains that circumstances require the employee who has been forced to Toronto to continue to hold work on the spareboard rather than to use his or her seniority to find more advantageous work, a consequence which flows from the effect of article 48.15 of the collective agreement, which reads as follows:

48.15 Employees exercising their seniority to a permanent vacancy on a district assignment at another terminal shall be considered as regularly assigned to such other terminal.

Therefore, according to the Union's representative, the employee forced to Toronto would effectively burn his or her bridges back to his or her original terminal if that employee should seek to improve his or her lot by exercising his or her seniority to take a permanent vacancy in Toronto. He or she would then no longer be considered as regularly assigned to his or her original terminal, and then would even lose the avenues of return recognized by the Company.

In light of the provisions of the collective agreement the Arbitrator finds it difficult to accept the position advanced by the Company. In matters of labour relations and collective agreements seniority rights are of primal importance. That is why grievance arbitrators have recognized that a particular interpretation of a collective agreement which has the effect of reducing seniority rights, or limiting their application, must be supported clear and unequivocal language within the collective agreement. That well established principle was clearly expressed in the **Tung-Sol** award of Judge Reville:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

(See **Tung-Sol of Canada Ltd.** (1964), 15 L.A.C. 161 (Reville) at page 162.)

In this grievance the Company maintains that an employee forced to Toronto loses the ability to exercise his or her seniority on posted vacancies in his or her original terminal, whether between changes of timetable or at the time

of timetable changes. After a careful examination of the provisions of the collective agreement the Arbitrator has difficulty understanding the merit of that submission.

It is true that the collective agreement recognizes that an employee who holds a position on a furlough board can be forced to displace to cover a shortage of staff in another terminal. However, it is well recognized that at the new terminal the employee has the status of a stranger, to the extent that article 91.11 (e) provides to that employee the benefit of article 72 which deals with expenses "away from home".

Further, there is no provision of the collective agreement which provides that the employee forced to displace outside of his or her original seniority district loses his or her full seniority rights in that district. Therefore, as a result, what is to be made of the provisions of article 48.1 of the collective agreement which deal with the posting of positions in the former seniority districts of Quebec and the Atlantic? Paragraph 48.1(a) reads as follows:

> **48.1** Except as provided by paragraphs 47.9 to 47.17 inclusive between changes of timetable/change to service dates:
>
> **(a)** on Seniority District 1 to 11 inclusive:
>
> **(1)** permanent vacancies;
>
> **(2)** permanent new district assignments anticipated to be of more than 90 days in duration;
>
> **(3)** temporary new assignments anticipated to be of more than 7 but less than 90 days in duration;
>
> **(4)** positions on spare boards, when additional spare employees are required and there are no employees on the Seniority District on cut-off or laid off status; and
>
> **(5)** work trains and seasonal assignments;
>
> will be bulletined on the applicable Seniority District for 7 days and the senior qualified applicant therefore will be assigned.

(It should be noted that former seniority districts 1 to 11 were consolidated to form districts 18 and 19 which, afterwards, were merged with seniority district 17 to establish the current 20th seniority district.)

The parties to this dispute are sophisticated as relates to the negotiation of the terms of their collective agreement. They could well have written article 48.1 to make it clear that the qualification and seniority of the candidates are not the only factors which are controlling. For example, they could have limited the exercise of seniority to employees who hold active positions in seniority districts 1 to 11 inclusive, which would prevent applications from employees who might be laid off as well as employees forced to a terminal like Toronto, outside seniority districts 1 to 11. However, there is nothing in the language of article 48.1 to indicate that the parties had the intention of establishing different categories of seniority by suppressing the bidding rights of certain employees, for example employees who might be laid off or were forced to fill a shortage of staff outside seniority districts 1 to 11. For the purposes of article 48.1, it appears to the Arbitrator that the only condition precedent to bidding on a job posting, other than qualification, is that the bidding employee hold seniority rights in the "applicable seniority district".

There is very simply no provision in the collective agreement which would remove from an employee forced outside his or her seniority district that employee's seniority right within the home district. There is similarly nothing in these provisions, nor in the provisions of article 91.11 of the collective agreement, which would impose any limit whatsoever in relation to the exercise of seniority rights of employees forced to other seniority districts.

The Arbitrator is satisfied that the conclusion is the same as regards the posting of notice of vacancies at the two changes of timetable contemplated in articles 48.2 and 48.6 of the collective agreement. There again, there is no indication in the language of the provisions that the parties intended to establish certain classes of employees who would have a lesser form of seniority right than others. In other words, the right to bid at the change of timetable depends on the seniority of an employee on the seniority district in question. That an employee be on layoff or that he or she be in forced service in another of the former seniority districts does nothing to reduce his or her full seniority rights in that employee's district of origin. It would have been possible for the parties to agree otherwise, but so radical a departure from the seniority system and rights of seniority would required clear and unequivocal language. There is nothing in the present text of the collective agreement which stipulates that an employee forced

outside his or her original seniority district loses the right to exercise his or her seniority when there are vacancies in that same seniority district, whether it is between or at the time of the change of timetable.

The Arbitrator is not persuaded by the position of the Company that only employees who displace voluntarily outside their seniority district can exercise a right of return. The employer relies on the provisions of article 49.37 which reads as follows:

> **49.37** Employees exercising seniority to a temporary shortage shall not be required to protect the shortage beyond 6 months from the date that the employee arrives at the shortage location.

In my view, this article has a twofold purpose. Firstly, it allows the Company to encourage volunteers to fill a temporary shortage of employees in another district, which reduces the need to force employees under article 91.11. Secondly, after the consolidations of the seniority districts into the new 20th district, the article permits the temporary transfer of a volunteer without that employee suffering the consequence of a permanent transfer which would otherwise flow from the application of article 48.15. Therefore, the Arbitrator cannot come to the conclusion, by inference, that article 49.37 supports the position that employees who are not volunteers, but who are forced outside their seniority district under article 91.11, lose the ability to exercise their seniority in their original terminal or seniority district. Article 49.37 is best understood as a qualification to article 48.15. It does not deal with the rights of employees forced under article 91.11.

For these reasons the Arbitrator must decline to accept the position of the Company and must allow the grievance. It is notable that this conclusion does not necessarily prevent the Company from forcing a sufficient number of employees to cover it's need in any terminal within the former 17th district where there might be a lack of manpower. If, for example, an employee who has been forced exercises his or her right to return to his or her original terminal by the use of seniority, he or she could well be replaced by a more junior employee, in keeping with the provisions of article 91.11. In the result there would be an unfolding of the process which would be consistent with the overall integrity of the seniority system established within the collective agreement.

For these reasons the Arbitrator declares that the position of the Union is well founded and that the employees who were forced to displace to Toronto had the right to bid on posted vacancies in their original seniority district, whether at the change of timetable in the spring of 2003 or between timetable changes. The Arbitrator directs that the affected employees be compensated for any wages and benefits lost, if any. I retain jurisdiction to resolve any dispute which may arise respecting the interpretation or implementation of this award.

September 25, 2003

(signed) MICHEL G. PICHER
ARBITRATOR

[TRANSLATION]