

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the “Employer”)

AND:

UNIFOR LOCAL 101R

(the “Union”)

(Lethbridge Seniority Lists and Job Bids –
Grievance No. 289-2017-005/CAN-UNIFOR-2017-00000240)

ARBITRATOR:

Vincent L. Ready

COUNSEL:

Sharney Oliver
for the Employer

Jim Wiens
for the Union

HEARING:

December 3, 2020
Virtual hearing

PUBLISHED:

February 16, 2021

The parties agreed I was properly constituted as an arbitrator under the terms and provisions of the Collective Agreement with the requisite jurisdiction to hear and determine the matters in dispute.

This matter pertains to a grievance filed by the Union regarding the Company's alleged failure to provide updated seniority lists at the Lethbridge Mechanical Repair Facility.

FACTS

The parties submitted a Joint Statement of Issue which is reproduced below:

DISPUTE:

The Company's alleged failure to provide updated seniority lists at the Lethbridge Mechanical repair facility as per Rule 23.4 of the Collective Agreement.

JOINT STATEMENT OF FACTS:

Rule 23.4 states the following:

Seniority lists shall be updated and posted at the locations of all employees concerned, on or before June 15 and December 15 of each year. A copy of such list shall also be furnished to the duly authorized local representative, the respective Regional Vice-President and the President of Local 101.

- The Union grieved the issue on September 28, 2017 requesting compensation for all mechanical employees in the Pacific Region who were laid off after June 15, 2017 and unable to exercise their seniority to the Lethbridge facility.
- The Union further requested compensation for Mechanical Employees in the Pacific Region for any additional costs that were incurred in association with being withheld at their

current work location due to the delays in the opportunity to accept a newly created position at the Lethbridge Facility.

- October 26, 2017 the Company replied, denying the grievance.

Union Position:

The Union maintains they have made broad, significant, and consistent efforts to pressure the Company to correct, update and post accurate seniority lists in Southern Alberta without success. On April 19, 2017, the Union identified that the bi-annual December 2016 seniority list for Southern Alberta (Lethbridge & Medicine Hat) had not yet been prepared and requested an update to coincide with the scheduled June 2017 posting without success.

The Union maintains that should these vacancies have been offered to eligible employees in other locations within the Pacific Region, they would have been filled internally before new hires were brought into the workplace. An unknown number of employees have been affected by the violations of Rule 23. We will only know which specific employees were harmed following a sincere regional bidding of these positions, in compliance with the process for filling permanent vacancies directed in Rule 23.

Further, should the seniority lists have been accurate and complete, employees furloughed in 2017 would have been able aware that junior employees remained at work in the Lethbridge Facility during their lay off period and they could have exercised their seniority and remained employed.

The Company's Step 2 reply does not dispute the violations.

There are current eligible Unifor-represented employees in the Pacific Region that would accept a position in the Lethbridge facility, should they now be given the opportunity.

COMPANY POSITION:

The Company disagrees and denies the Union's request.

In their position within this Joint Statement of Issue, the Union identifies April 19, 2017 as a triggering date for their contentions. Given this is new information, not included in the Step II grievance correspondence, the Company cannot agree that the Union's grievance was filed in a timely fashion as per the requirements of

the Collective Agreement and as such is not appropriately before the Arbitrator.

The Union states the Company did not dispute these violations in the Step II response. The Company maintains the response was written to reflect the grievance as submitted and not the Union's expanded position at the doorstep of Arbitration.

The Union has failed to identify in either their Step II grievance or Joint Statement of Issue, any employee who was adversely effected. The Union references "newly created positions" but fails to provide any particulars regarding them – including a date of implementation.

The Union bears the responsibility of providing a fully particularized argument within their grievance and further bears the onus to demonstrate that an adverse effect occurred. Given the Union's failure to provide any specific adverse effects experienced as a result of the circumstances, the Company cannot agree that the Union or its members are entitled to any compensation.

Further, the Company would argue that in this instance the doctrine of laches would apply.

In the Step II response, the Company did provide the following declaration:

The Company recognizes the importance of keeping updated seniority lists in accordance with the Collective Agreement. The managers of this location have been notified, and have committed to updating the Lethbridge seniority lists in collaboration with the local Union representative.

Given the details provided by the Union in the grievance submission, the Company would maintain that the scope of the grievance is limited and that this declaration was the appropriate remedy to the situation.

The Company requests that the Arbitrator deny the Union's grievance in its entirety.

POSITIONS OF THE PARTIES

Position of the Union

The Union contends that the Employer's actions breach Rule 23.4 of the Collective Agreement – which requires the Employer to post updated seniority lists every six months. The Union highlights that three new Diesel Mechanic positions were created and posted at the Lethbridge facility in March 2017, and that the postings for these two positions were not made to the Basic Seniority Territory or the Pacific Region as required by Rule 23.13 of the Collective Agreement.

The Union observes that no Lethbridge facility employees bid on the position, and the Employer proceeded to hire three new employees from outside the bargaining unit for these positions. The Union asserts that the Employer's non-compliance with Rules 23.11.1 and 23.4, may have denied laid off employees the opportunity to be awarded these positions either in the Basic Seniority Territory in accordance with Rule 23.17.1 or in the Region in accordance with Rule 23.18. The Union disputes the Employer's objection that it has not sufficiently particularized which employees specifically have been adversely impacted by the Employer's actions, asserting that the Employer is aware of employees who would have been eligible to transfer to the Lethbridge facility.

In response to the Employer's position that the grievance is untimely, the Union argues it learned in March 2017 that the seniority list at the Lethbridge facility had not been updated since 2015. It submits that, despite an agreed-upon process to resolve this issue, and a Collective Agreement-imposed deadline of June 15, 2017, the Employer failed to provide an updated list, even after the Union followed up on the issue on July 24, 2017. Further, it notes the

Employer has previously admitted that it has failed to remedy this situation. The Union therefore argues the grievance ought to be allowed, and requests an Order requiring the Employer to comply with the Collective Agreement requirement to post an updated seniority list for the Lethbridge facility, and compensation for any employee in the Pacific Region who was laid off at the time and would have been able to exercise their seniority to apply for a Diesel Mechanic position at the Lethbridge facility but for the Employer's failure to update the seniority list and post the positions in the Basic Seniority Territory and the Region.

Position of the Employer

The Employer requests that the grievance be dismissed in its entirety. The Employer asserts that the grievance is untimely because a disagreement over the interpretation of a Collective Agreement provision must be submitted within 35 days from the date of the alleged infraction. The Employer asserts that this timeline should run from April 19, 2017 – when the Union requested that the Employer post an updated seniority list. The Employer suggests the Union's failure to abide by the Collective Agreement grievance timelines indicates it was not seriously concerned about this issue. On this point, it notes the Union did not grieve the Diesel Mechanic positions even though the Union was aware of them when they were posted. The Employer additionally challenges the validity of the grievance on the basis it was filed by Mr. Wiens, Vice-President – Western Region, who the Employer asserts is not a “duly authorized local union representative” under Rule 28.7. For these reasons, the Employer argues that the grievance is not properly before me.

The Employer submits that the Union failed to grieve the seniority list issue on multiple occasions since 2015 and therefore the doctrine of laches must apply and the grievance accordingly denied. Further, the Employer asserts that the Collective Agreement does not provide for any remedy in the

event of non-compliance with Rule 23.4, and submits that any remedy imposed would amount to a change, modification or addition to the Collective Agreement which is outside the arbitrator's jurisdiction. The Employer submits the Union has already received an appropriate remedy in the form of the Employer's commitment in its Step II response, to updating the Lethbridge seniority lists in collaboration with the local Union representative. Further, the Employer argues, the Union has not provided any evidence that any specific employee was adversely impacted, and has not proven a nexus between the Employer's failure to provide a current seniority list and the posting and filling of the Diesel Mechanic positions at the Lethbridge facility in June 2017. The Employer asserts the Union is on a fishing expedition in order to substantiate its claim and that the Union has not met its burden of proof.

DECISION

As a starting point, I am not prepared to dismiss the grievance on the basis it is untimely. In so stating, I observe that the Union's allegation in this case is of a continuing nature. While it is always advisable for issues to be raised at the earliest opportunity, and certainly any remedy awarded could be impacted by a failure to grieve in a timely fashion, I cannot find that the Union is precluded from grieving this ongoing breach of the Collective Agreement simply because it may not have raised the issue upon the first breach.

Reviewing the facts of this case, I have little difficulty finding the Employer has not complied with its obligation under Rule 23.4 to post updated seniority lists at the Lethbridge Mechanical repair facility. The clear language of the Collective Agreement obligates the Employer to post these lists twice yearly on set dates, and the Employer did not do that as it is clearly required to do. It is trite to note that implicit in the requirement to provide updated seniority lists is that these lists are accurate and up-to-date at the time of posting. I therefore declare the Employer has breached Rule 23.4 of the Collective

Agreement and order it to comply with the Collective Agreement requirement to post an updated seniority list for the Lethbridge facility on a go-forward basis.

I respectfully decline to award compensation to any employee in the Pacific Region who was laid off at the time of the impugned postings and who may have been eligible to apply. I agree with the Employer that this remedy does not properly flow from the grievance as written nor has the Union established that any specific employee was adversely impacted by the Employer's breach of Rule 23.4. I therefore restrict the remedy in this case to the declaration and order set out above.

The grievance is allowed in part. It is so awarded.

This award is issued pursuant to the arbitration provisions of the Collective Agreement (Rules 29.1-29.7).

Dated at the City of Vancouver in the Province of British Columbia this 16th day of February, 2021.



Vincent L. Ready