CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1364

Heard at Montreal Thursday, May 16, 1985

Concerning

CP EXPRESS AND TRANSPORT

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EX PARTE

DISPUTE:

Concerns the application of Article 8.9 of the Job Security Agreement, in particular interpreting in the exercise of seniority an employee accepts the highest rated position at his location to which his seniority and qualifications entitle him; and

The application of Article 17.4 of the Collective Working Agreement when a grievance based on a claim for unpaid Maintenance of Basic Rates is not progressed due to when the appropriate officer of the Company fails to render a decision with respect to such claim for unpaid MBR within the prescribed time limits, the claim will be paid; and

That senior sleeper team drivers holding the bulletin must bid for or displace to the highest paying sleeper position to protect his incumbency rate; and

That all single drivers must bid or displace to the highest paying single position to protect their incumbency rate.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Company's position is that Mr. B. MacFarlane, - Mileage Rated Vehicleman, Calgary, Alberta, must be forced to take the position offering the highest remuneration even when such sleeper team position cannot be formed due to incompatibility between Mr. B. MacFarlane and all other mileage rated vehiclemen to form a sleeper team with senior sleeper team driver B. MacFarlane.

The Union's position is that senior sleeper team driver Mr. B. MacFarlane did exercise his seniority with qualifications to sleeper team positions but in keeping with Article 33.23.4 he was unable to form a sleeper team from the other mileage rated vehiclemen at Calgary who had bid these sleeper team positions at the home terminal of Calgary due to the incompatibility between the senior sleeper team driver B. MacFarlane and the other mileage rated vehiclemen at Calgary, who had bid these positions.

The Union's position is that Mr. B. MacFarlane did apply every measure at his control and did exercise his seniority with qualifications to the highest rated position which was available to him as clarified in arbitration award 1158.

The Union's request that the daily established MBR as worked out for December 1, 1983, and increased January 1, 1984, be reinstated to employee Mr. B. MacFarlane.

FOR THE BROTHERHOOD:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN, SYSTEM BOARD OF ADJUSTMENT, #517

There appeared on behalf of the Company:
N. W. Fosbery – Director, Labour Relations, Toronto

And on behalf of the Brotherhood:
J. J. Boyce – General Chairman, Don Mills
G. Moore – Vice-General Chairman, Moose Jaw

AWARD OF THE ARBITRATOR

The dispute in each of these cases (**#1361** to **#1364, #1366,** and **#1368 to #1371**) raises the question as to whether the trade union was obliged to refer the grievance disputes to the Administrative Committee provided under Article 3.8 of the Job Security Agreement. At issue is whether CROA has the jurisdictional competence to deal with disputes that are more appropriate to an alternative and agreed to grievance and arbitration procedure. In this regard Articles 3.7 and 3.8 of the Job Security Agreement reads as follows:

> **GRIEVANCE PROCEDURE AND FINAL DISPOSITION OF DISPUTES**
> **3.7** Should any dispute arise respecting the meaning, interpretation, application, administration or alleged violation of this Agreement, such dispute shall be progressed in accordance with the provisions of the applicable collective agreement commencing at the authorized "designated officer" level.
>
> **3.8** Failing settlement of such dispute at the final step of the grievance procedure, should either party elect to progress the dispute it shall do so by referring it to the Administrative Committee, EXCEPT that if the dispute is one involving the question of whether or not a change is a technological, operational or organizational one as contemplated under Article 8.1 of this Agreement, then such dispute shall be progressed to arbitration under the provisions of the applicable collective agreement.

There is no dispute by the parties that each of the grievances pertain to employees who have elected to exercise rights (inclusive of displacement privileges) under the Job Security Agreement as a result of the company putting into effect technological, operational and organizational changes that are contemplated by Article 8.1 of the Job Security Agreement. It is also agreed that to all intents and purposes the Maintenance of Basic Rates (MBR's) have been resolved with respect to those employees who have been adversely affected by these changes.

The clear objective of Articles 3.7 and 3.8 of the Job Security Agreement is to facilitate the resolution of any dispute with respect to the application of the Job Security Agreement through the efforts of the parties' representatives on the Administrative Committee. Moreover, the only matter reserved for CROA to resolve with respect to any dispute under the Job Security Agreement is the question of whether "a technological, organizational or operational change" took place. In all other respects the trade union is required to refer its grievances to the Administrative Committee.

The trade union insists, however, that the grievance disputes that have been referred to CROA do not involve the application, interpretation and alleged violation of provisions of the Job Security Agreement. Rather, it is argued that these disputes relate solely to the application, interpretation and alleged violation of what was referred to as "the working agreement". Since CROA is the sole adjudicative body seized with the jurisdiction to deal with grievances relating to "the working agreement" it was urged that I am properly seized of those grievances. Accordingly, in order to determine the appropriate and governing grievance and arbitral procedure for these grievances it is necessary that a brief analysis be made of the nature of the disputes that have been referred. For convenience sake the trade union has grouped these grievances into three categories. I shall deal with each category as follows:

(i) CROA Cases #1361, #1363, #1364, #1370, #1371

The dispute in these cases is whether the grievors have exercised seniority with respect to their displacement into the highest rated position in which seniority and qualification entitle.

The employer asserted that the grievors have not satisfied the exigencies of Article 8.9 of the Job Security Agreement and has reduced the incumbency rates paid these employees accordingly. The trade union contests the allegation that the grievors have not complied with the provisions of Article 8.9 in selecting the appropriate highest rated position.

Without referring directly to Article 8.9 of the Job Security Agreement this group of grievances falls squarely within the exigencies of Articles 3.7 and 3.8 requiring the invocation of the Administrative Committee. Surely, the parties intended that the Administrative Committee should attempt to resolve disputes relating to whether the company has properly concluded that the grievors have or have not complied with the requirements of Article 8.9 of the Job Security Agreement. Or, more particularly, that issue relates to whether the company had proper cause to reduce the incumbency rates with respect to those employees.

These disputes clearly involve the application interpretation and alleged violation of Article 8.9 of the Job Security Agreement and are therefore not properly before CROA. It is my view that the trade union must give deference to the Administrative Committee.

(ii) CROA Cases #1362, #1368 and #1369

These disputes pertain to whether the employer applied the improper rates of pay pursuant to a letter of understanding for composite duties performed by the grievors in doing both city and highway driving. The employer argued that the lower city rate of pay should apply with respect to the work performed. The trade union insisted that a ten pay per averaging rate should apply as contemplated by the letter of understanding referred to at the back of the working agreement.

The letter of understanding reads as follows:

> The matter of establishing incumbency rates for highway vehiclemen who are mileage-rated in Western Canada. Until such time as negotiations re-commence, the following will apply:
>
> > The manner in which incumbency rates will be established for mileage-rated drivers under the provisions of Article VIII of the Job Security Agreement is as follows:
> >
> > The total mileage paid, plus General Holidays, plus work time for the ten pay periods prior to the change divided by the number of days for which payment was received to establish a daily rate of pay. (NOTE: Two trips on one day, with layover between trips, constitutes two days work).
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> Dated March 15, 1977

In resolving this issue it is important to stress that the incumbency rates (i.e., MBR's) with respect to employees who have exercised rights under the Job Security Agreement have been resolved to the parties' mutual satisfaction. This is not a dispute with respect to the application or interpretation of the Job Security Agreement insofar as they deal with the propriety or the manner in which those rates of pay were arrived at. As the trade union insisted those rates of pay have been resolved.

Accordingly, what is in issue, simply put, is whether the grievors have been properly paid in accordance with those rates. And, in my view, that is a question that squarely falls within the jurisdiction of CROA in determining whether an appropriate rate of pay has been paid under "the applicable collective agreement". In other words, these disputes do not pertain to the determination of an appropriate rate under the Job Security Agreement but whether the determined rate has been properly paid for work performed.

As a result, I am satisfied that this group of grievances is properly arbitrable before CROA.

(iii) CROA #1366

This grievance pertains to whether the grievor was paid the appropriate rate of pay for the April 20, 1984, holiday in accordance with Article 33.21 of the working agreement. In that case the company paid the grievor 290 miles pay at the rate prescribed by the schedules contained in the working agreement. The trade union insisted that the MBR rates determined pursuant to the Job Security Agreement should have been applied to the 290 miles. In other words, the sole issue is the appropriate rate to be applied to the 290 miles in determining the grievor's holiday pay.

Again, as in the previous group of cases, what is not in issue is the application or the interpretation of the Job Security Agreement insofar as the MBR rates have been settled. What is in issue is the appropriate rate of pay that should be applied for a paid holiday pursuant to Article 33.21 of the working agreement.

As a result it is my conclusion that this is a matter that is appropriate for reference to CROA.

In summary I am satisfied that those grievances grouped under category (i) are not arbitrable at CROA but should be referred to the Administrative Committee under the Job Security Agreement; and I am also satisfied that those grievances grouped under categories (ii) and (iii) have been properly referred to CROA and are therefore arbitrable.

Those grievances that are arbitrable will be scheduled for hearing.

(signed) DAVID H. KATES
ARBITRATOR