CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1369

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 the letter of understanding on the establishing of maintenance of basic rates for warehouseman – vehicle – tractor – trailer composite qualified mileage rated vehicleman and Article 8.9 of the Job Security Agreement; and

The application of Article 17.4 of the collective working agreement when a grievance based on a claim for unpaid wages of a daily MBR rate of wages is not progressed at Step 3 due to that the Director, Labour Relations, who as one of the Appropriate Company Officers failed to render a decision with respect to such claim for unpaid daily MBR of pay within the prescribed time limits, the claim will be paid.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Company's position at Step 2 was that the grievance in proper order of procedure and time limits and full acceptance that although Mr. J. J. Ivens, Kelowna, British Columbia, was not a linehaul driver he was qualified as a mileage rated vehicleman and was required to a did pull spare and extra trips when they were available and offered to him for the period July 28th, 1983, through to and including November 30th, 1983 and

Inasmuch as the Company's position at Step 3 has not, as yet, been presented even though three and one half months have passed since September 25th, 1984, therefore Article 17.4 of the Collective Agreement has been breached.

The Union's position is that J. J. Ivens was permanently employed in Kelowna, British Columbia, as a warehouseman – driver required to perform tractor – trailer duties and highway mileage rated duties as required prior to the Article 8 notice of the Organizational change, and in keeping with Article 8.9 of the Job Security Agreement which is self- explanatory, J. J. Ivens should have continued to be paid at the average MBR rate applicable to the position he permanently held and to the average of the wages he earned for the ten pay periods prior to the change, therefore, inasmuch as J. J. Ivens was required to work many hours as a terminal tractor trailer - warehouse vehicle operator and many hours as a mileage rated vehicleman and thousands of miles as a mileage rated vehicleman, in all fairness his maintenance of rate should have been established through the total worked earnings for the ten pay periods July 28, 1983, through to November 30th, 1983, so as to arrive at a fair MBR.

The Union request that J. J. Ivens MBR be worked out through the application of Article 8.9 of Job Security and by the use of the letter of understanding dated March 15, 1977, page 89 of our collective working agreement as worked out through the use of the letter of January 31st, 1984, from J. P. Myhre, first three paragraphs.

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

PRELIMINARY 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).
>
> 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.

A Hearing was held on July 11, 1985, 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
J. Crabb – General Secretary-Treasurer, Toronto
M. Gauthier – Vice-General Chairman, Montreal
D. Wray – Counsel, Toronto

AWARD OF THE ARBITRATOR

The parties agreed that the cases of R. Shellenberg (**#1368**) and J. Ivens (**#1369**) should be consolidated in the one proceeding.

The simple issue in this case is whether the company erred in paying the grievors the appropriate pay rate for work performed pursuant to the pay provisions of the "working" collective agreement. Incidentally the resolution of that question obviously will turn on whether the company has properly interpreted Article 8.9 of the Job Security Agreement which reads as follows:

> **8.9** An employee whose rate of pay is reduced by $2.00 or more per week, by reason of being displaced due to a technological, operational or organizational change will continue to be paid at the basic weekly or hourly rate applicable to the position permanently held at the time of the change.

The evidence indicated that the grievors' prior to the notice being given under the Job Security Agreement, were paid in their capacity as Warehousemen/Drivers a composite rate of pay. While performing Warehouseman's duties (inclusive of city driving) they were paid in accordance with the applicable hourly rate. And, while engaged in highway transport driving they were paid the mileage rate applicable to Highway Drivers.

After the notice was effected and the Maintenance of Basic Rates (MBR's) were established for both Warehousemen/Drivers and Highway Transport Drivers the company, irrespective of the amount of highway driving performed, restricted the Warehousemen's/Driver's rate to the MBR (hourly rate) established for that position. Accordingly, a Warehouseman/Driver could technically perform the vast majority of his working hours engaged in highway transport driving and be restricted for pay purposes to the Warehousemen's rate.

The company secures support for this position from the phrase "... will continue to be paid at the basic weekly or hourly rate applicable to the position permanently held at the time of the change" contained in Article 8.9 of the Job Security Agreement.

It seems to me, however, that the relevant rates of pay that were applicable to the permanent positions held by the grievors at the time of "the change" were two rates. The one rate applied to Warehousemen/Driver's work and the other applicable rate was the mileage rate paid for highway transport driving. In adhering to the letter as well as the spirit of Article 8.9 the company, accordingly, was obliged to apply the appropriate rate to the two functions that

are performed by the Warehouseman/Driver. As a result, I am of the opinion that the appropriate pay rates anticipated under the "working" agreement in light of the established MBR'S were not applied by the company.

The parties are accordingly directed to meet with a view of determining an appropriate amount payable to the grievors for the highway transport driving that was performed.

I shall remain seized of this dispute in the interim.

(signed) DAVID H. KATES
ARBITRATOR