CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2251

Heard at Montreal, Wednesday, 15 April 1992

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

Company's refusal to allow the relocation of employees Messrs. W. Graham and R. McCarragher from Montreal, Angus Stores, To Winnipeg, Weston Stores.

JOINT STATEMENT OF FACT:

On September 16, 1991, the Company issued to the Union various notices advising of its intention to close Angus Shops in accordance with Article 8.1 of the Job Security Agreement.

The Company also informed the Union that due to this operational and organizational change, eight (8) positions were to be created within the Stores Department, six (6) at St. Luc and two (2) at Winnipeg. The positions were bulletined in accordance with Article 23 of the Collective Agreement.

JOINT STATEMENT OF ISSUE:

The Union claims that employees Graham and McCarragher, the only qualified applicants for the Winnipeg positions, were denied the right to transfer in accordance with Article 37 of the Collective Agreement.

The Union claims on their behalf the right to transfer with their work, all lost wages and all benefits contained in Article 6 of the Job Security Agreement from February 3, 1992.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) C. PINARD	(SGD.) I. J. WADDELL
FOR: EXECUTIVE VICE-PRESIDENT	MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

C. M. Graham	– Supervisor, Training & Accident Prevention, Purchases & Materials, Montreal
D. David	– Labour Relations Officer, Montreal
A. Y. deMontigny	– Supervisor, Personnel & Labour Relations, Mechanical Department, Montreal

And on behalf of the Union:

C. Pinard	– Division Vice-President, Montreal
R. Pagé	– Local Chairman, Montreal
R. McCarragher	– Grievor
W. Graham	– Grievor

AWARD OF THE ARBITRATOR

It is common ground that this is the first time the parties have applied article 37.1 of the collective agreement, a provision which was added to their contract by the award of Arbitrator Dalton L. Larson dated April 11, 1988. That provision is a follows:

> **37.1** When through an unusual development it becomes necessary to transfer work from a seniority terminal, Division or Region, to another seniority terminal, Division or Region, not more than a sufficient number of employees to perform such work shall, in seniority order be given the opportunity to transfer, carrying their seniority rights with them. The proper officer of the Railway and the General Chairman shall co-operate to determine the number of employees who shall transfer.

The position of the Union is that the foregoing provision is clear and unqualified, and that it should be interpreted to provide to the two grievors, who are the only applicants for the two positions created at Winnipeg, the right to transfer with the work to that location. The Company, however, submits that the application of the article is not automatic in all circumstances, and requires the exercise of judgement by the parties with respect to the viability of continued employment prospects for any individual who may be subject to transfer within its terms. This, the Company submits, is the effect of the final sentence of article 37.1, whereby consultation takes place between the Company and the Union to identify the employees who may transfer with a realistic prospect of holding work.

The Company relies, in part, on the reasoning of Arbitrator Dalton Larson as expressed in his award in the following terms at p. 74:

> Some collective agreements already have some type of provision for employees voluntarily transferring with their work to locations beyond their basic seniority territory. Rule 23.25 of the collective agreements covering the Carmen and the Boilermakers as well as the Electricians (CN) provide as follows:
>
> > When through an unusual development it becomes necessary to transfer work from a seniority terminal, Division or Region, not more than a sufficient number of employees to perform such work shall, in seniority order be given the opportunity to transfer, carrying their seniority rights with them. The proper officer of the Railway and the General Chairman shall cooperate to determine the number of employees who shall transfer.
> >
> > Employees who transfer under this Rule 23.25 shall after 90 calendar days lose their seniority at the seniority terminal they left.
>
> To some extent the problem of transfers will be resolved with the larger seniority units but, to the extent that it is not, I think it will be sufficient if I provide an option to voluntarily transfer to all employees covered by collective agreements under my jurisdiction. **Accordingly, I order that all agreements be amended to provide the same rights as are contained in Rule 23.25 above.**
>
> [emphasis added]

The Company stresses the final sentence of the extract from the reasoning from Arbitrator Larson in support of its position. It draws to the Arbitrator's attention many years of history of Rule 23.25 as it has been applied in the collective agreements covering the Carmen, Boilermakers and Electricians within the Shopcraft Unions at CN, as well as within the Company's own collective agreements with the Shopcraft Unions, since 1923, as amended in 1965. It is not disputed that for a period of at least ten years the Company has applied Shopcraft Rule 23.25 in such a way as to require that any employee exercising rights under that rule must be in a position to ensure that their seniority would be such as to allow them to hold work at the transferred location for a reasonable period of time. This, the Company submits, is a necessary feature of the provision, as it would otherwise be put to undue expense to transfer employees across great distances, even though they would shortly thereafter be subject to further displacement or layoff because of their inability to hold work at the new location.

The Arbitrator finds the position advanced by the Company to be compelling. In interpreting a provision such as article 37.1 of the instant collective agreement it is, plainly, artificial to strive to construe the mutual intention of the parties, insofar as the language in question was handed down by an arbitrator in the face of the inability of the parties to agree. The more instructive question is to glean the intention of Arbitrator Larson. On balance I am satisfied that

the learned arbitrator intended to accord to the non-operating employees of the instant bargaining unit the rights and protections which already existed for other non-operating employees within the industry. He was, in other words, persuaded that the Union's members should be given the advantage of a previously established industry standard whereby, subject to certain conditions, they would be granted a right to transfer with their work, as a measure of job security to be contained within the terms of their collective agreement. As is clear from the passage from Mr. Larson's award, quoted above, the arbitrator intended that the members of the Union party to this grievance be given, through article 37.1, the same rights to transfer voluntarily with their work to locations which are beyond their basic seniority territory as are found in rule 23.25 of the Shopcraft agreements. The unchallenged representations of the Company establish that for many years that rule has been subject to a requirement that employees electing such transfer must have sufficient seniority at the new location so as to have a reasonable opportunity of holding work, and that the determination of that question has historically formed part of the consultation between the proper officer of the Railway and the general chairman of the Union involved.

In the instant case the evidence discloses that the Company's semi-annual plan contemplates a number of job abolishments in Winnipeg, and the consequent displacement of employees at that location. It is not disputed that the seniority of the grievors would place them at or near the bottom of the seniority list of bargaining unit employees at that location, so that they would be without any real likelihood of avoiding further displacement or layoff, should they be transferred to the Weston Store. In contemplation of that likelihood, the Company submits that there is no obligation under the terms of article 37.1, as it has been historically applied, to transfer the grievors.

For all of the reasons reviewed, the Arbitrator must agree with that interpretation of the provision. In my view, the conclusion so made is, moreover, consistent with a purposive and rational application of the collective agreement. It is plainly not in the interest of the employees, their Union or the Company to go through the time, expense and dislocation of a transfer which, for all practical purposes, is doomed from the outset to be temporary, if not entirely illusory, as regards any ongoing job security for the employees involved. While it is true that no absolute certainty can be brought to bear in such matters, it is, at a minimum, consistent with the interpretation and application of article 37.1 of the collective agreement, as it has evolved for many years in the past in other parts of the non-operating sector, that an employee availing himself or herself of protections under that provision should have a reasonable likelihood of an ability to hold work, by seniority, at the location to which they are to be transferred.

For the foregoing reasons the grievance must be dismissed.

April 16, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR