CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2402

Heard at Montreal, Wednesday, 13 October 1993

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Request for notice pursuant to Article 8.1 of the Employment Security and Income Maintenance Plan dated April 21, 1989, when a supervisor was released from his excepted employment and displaced an employee represented by the Brotherhood.

JOINT STATEMENT OF ISSUE:

On June 20, 1989, the Brotherhood was issued an Article 8 notice that effective October 1, 1989, a number of positions in Revenue Accounting in Montreal were to be abolished.

Also effective October 1, 1989, Revenue Accounting Supervisor Mr. R. Langevin's supervisory position was to be abolished. Mr. Langevin subsequently exercised his seniority onto a position occupied by Mr. C. Gloutney, who is represented by the CBRT&GW.

It is the Brotherhood's contention that a notice pursuant to Article 8.1 of the ESIMP should have been issued because the abolishment of Mr. Langevin's supervisory position resulted from the effects of Revenue Accounting technological, operational and organizational changes that were introduced by the Company and adversely affected the employees, all of which is contrary to the Employment Security and Income Maintenance Plan. The Brotherhood requests that all affected employees be compensated for wages and benefits lost as a result of the displacement by Mr. Langevin.

The Company disagrees with the Brotherhood's contentions.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) T. N. STOL	**(SGD.) M. M. BOYLE**
NATIONAL VICE-PRESIDENT	**for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

R. Paquette	- Manager, Labour Relations, Montreal
M. M. Boyle	- Director, Labour Relations, Montreal

And on behalf of the Brotherhood:

T. N. Stol	- National Vice-President, Ottawa
J. Brown	- Representative, Montreal

The Arbitrator adjourned the hearing to December 1993.

On Wednesday, 15 December 1993, there appeared on behalf of the Company:

R. Paquette	– Manager, Labour Relations, Montreal
M. M. Boyle	– Director, Labour Relations, Montreal

J. Watt– System Labour Relations Officer, Montreal
W. Agnew – Manager, Labour Relations, Moncton

And on behalf of the Brotherhood:
T. Barron – Representative, Moncton
R. Beckworth – National Vice-President, Ottawa
R. Johnson – Representative, Montreal
R. J. Stevens – Regional Vice-President, Toronto
G. T. Murray – Regional Vice-President, Moncton
J. Brown – Representative, Montreal

AWARD OF THE ARBITRATOR

The issue in the case at hand is whether the Brotherhood was entitled to receive an article 8 notice in respect of the abolition of a supervisory position, as part of an organizational change, where the supervisor subsequently displaced an employee in the bargaining unit. By the Company's acknowledgment, the case is one of "simultaneous abolition" where the same organizational change impacts both supervisory and bargaining unit ranks. The issue raised, therefore, relates squarely to one discussed, although not ruled upon, in **CROA 2023**.

In **CROA 2023** the Arbitrator dismissed a grievance in which the Brotherhood claimed entitlement to an article 8 notice under the Employment Security and Income Maintenance Plan where a supervisor was released from his employment and displaced a bargaining unit employee. It was there found that the change implemented in the managerial ranks was purely "belt tightening" and did not constitute, in any event, a technological, operational or organizational change assuming that the ESIMP might have some application. In a side observation the Arbitrator wondered whether the parties would have agreed to a system of job security for employees which would effectively leave little or no protection for employees displaced by the return of a supervisor to bargaining unit ranks as a result of an organizational change. While questioning such a possibility, the Arbitrator noted:

> "... This is not a case of simultaneous abolition, however, and I need not make a final determination on this aspect of the dispute between the parties for the resolution of this grievance. Moreover, as there is some dispute between the parties with regard to the past practice respecting the treatment of bargaining unit employees displaced by supervisors returning to the unit as a result of abolishment of management positions, it is preferable that a determination on that basis be made in the light of fuller and more informative evidence."

The instant case has afforded the parties the opportunity to adduce full evidence with respect to past practice on that issue. The Arbitrator is satisfied that past practice is an appropriate form of evidence to be considered in the case at hand, as there is a patent ambiguity with respect to the scope of the application of article 8 of the Employment Security and Income Maintenance Plan. There is nothing on the face of the agreement which speaks directly to the concept of "simultaneous abolition" whereby supervisors are caused to return to bargaining unit ranks, thereby displacing employees as a consequence of an organizational change. For that reason the Arbitrator adjourned the hearing to give the parties the opportunity to research and present the fullest possible evidence with respect to past practice on this issue.

The initial position of the Brotherhood is that the language of article 8.1 of the Employment Security and Income Maintenance Agreement is clear and unambiguous. For the reasons expressed at the initial hearing, as the language of the agreement pertains to the movement of supervisors, the Arbitrator did not sustain that position. As to the interpretation of the provisions of the Employment Security and Income Maintenance Agreement, the Brotherhood argues that the award of Arbitrator D.L. Larson, dated April 11, 1988 led to certain changes in the collective agreement which should be seen as sustaining the Brotherhood's position in the case at hand.

The changes cited are two-fold: firstly the definition of operational or organizational change, inserted as paragraph (I) in the definition section of the Employment Security and Income Maintenance Agreement, along with the deletion of article 8.7; secondly, the Brotherhood points to the obligation inserted into the collective agreement by Arbitrator Larson with respect to semi-annual reports in relation to Company plans that may involve displacement or layoff of employees represented by the Brotherhood or otherwise involving a permanent decrease in the workforce. In this regard the Brotherhood's spokesperson refers the Arbitrator to the provisions of articles 1.2 and 11.9 of the collective agreement, whereby employees promoted into supervisory positions retain and continue to accumulate seniority for the purposes of the collective agreement.

The Arbitrator is not persuaded by the argument of the Brotherhood with respect to the definition of "employee" as it appears within the collective agreement, to the extent that it may be intended to cover supervisory staff. It is well-established that the term "employee", for the purposes of the **Canada Labour Code**, or the various provisions of a collective agreement or related documents, such as an insurance benefit plan, may vary in accordance with the intention of the parties. An individual who is on layoff, with recall rights, may be an employee for the purposes of recall, but for no other purposes under the collective agreement. Likewise, a retired individual may be an employee for certain purposes relating to his or her entitlement under a pension plan, but for no other purpose. In the case of a document such as the Employment Security and Income Maintenance Plan the intention of the parties with respect to the use of the word "employee" must be taken in context, having regard to the purpose of the agreement and the intention reflected within its terms. In this regard, reference to the definition provisions of the collective agreement, including the provisions relating to the preservation of seniority for promoted individuals, are of little assistance.

The Arbitrator considers the argument made by the Brotherhood in respect of the case pleaded before Arbitrator Larson to be more substantial. The difficulty with this aspect of the case, however, is that the Brotherhood has apparently been unable to direct the Arbitrator to any part of the extensive documentation and pleadings before Arbitrator Larson, or to any part of his award, where there is express discussion of the treatment of employees who are displaced by supervisors returning to the bargaining unit in the event of a technological, operational or organizational change. It is not disputed that the ESIMP has existed for some twenty-five years prior to the events giving rise to this grievance. It appears to be common ground that prior to the award of Arbitrator Larson the long-standing practice of the Company was that it did not provide article 8 notices under the ESIMP in the event of the abolishing of a supervisory position which could result in the return of the supervisor to the bargaining unit, and the subsequent displacement of employees represented by the Brotherhood. Given the extent and universality of that practice, there is no substantial basis upon which to conclude that it was carried on without the knowledge of the Brotherhood, or of other bargaining agents signatory to the ESIMP. If, as the Brotherhood suggests, Arbitrator Larson intended to deal with and change that practice, it would not be unreasonable to expect some explicit discussion of that issue in the learned arbitrator's award and, failing that, at least some reference in the submissions made to him by the parties on the issue. In this Arbitrator's experience, parties affected by Mr. Larson's award do not hesitate to make such references to support their positions in respect of the interpretation of the provisions of a collective agreement or of the Employment Security and Income Maintenance Plan flowing from the Larson award. In the absence of any such reference being made, the Arbitrator has difficulty with the argument of the Brotherhood that the Larson award, and the resulting amendments to the Employment Security and Income Maintenance Plan referred to above, were intended to change the *status quo* with respect to the treatment of employees impacted by the return of a supervisor to the bargaining unit.

What, then, does the evidence with respect to past practice disclose? It is not disputed that over the years there have been hundreds of occasions in which supervisors have returned to bargaining unit ranks because of the abolition of their positions. It appears that the first time the Brotherhood grieved the failure to provide an article 8 notice in such a case was in **CROA 2023**. For the reasons related above, that grievance was unsuccessful. In the case at hand the Brotherhood can direct the Arbitrator to only three individual cases in which the abolition of supervisory positions, and the return of the supervisor to bargaining unit ranks, resulted in the Company giving employees who are displaced certain of the protections under the Employment Security and Income Maintenance Plan, notably maintenance of earnings protection. All three of the examples cited arose in the context of the Moncton Main Shops, and emanate from changes implemented in the Purchases & Materials Department in that location in January and February 1988.

On the opposite side of the ledger, it is the representation of the Company that it has, consistently since the 1960's, never applied the ESIMP in the circumstance of the abolition of a supervisor's position. In support of its representation, it points to Company records relating to a substantial number of instances involving the abolishment of supervisory jobs and the return of the incumbent to the bargaining unit where, according to Company records, there is no indication of the displaced employees being given the protections of the ESIMP. On balance, the Arbitrator has little reason to doubt that the practice is as stated by the Company's representative. Moreover, bearing in mind that the Brotherhood bears the overall burden of proof on any material issue of fact which may be contested, including past practice, I must conclude that its evidence falls short of establishing the position which it advances.

In the result, the Arbitrator finds, for the reasons related above, that the practice accepted by the parties, from the earliest years of the ESIMP, reflects their understanding that the Company is not under an obligation to issue an article 8 notice in relation to the abolishment of a supervisory position. There is, moreover, nothing in the award of Arbitrator Larson, nor in the amendments of the Employment Security and Income Maintenance Plan which followed it, which would indicate that the parties intended to change their long-established practice and understanding.

Whatever view may be taken of the consequences of the parties' agreement, any change in the face of so long-standing a practice must be made in clear and unequivocal terms within the language of the collective agreement or of the ESIMP, as a result of bargaining. In the absence of any such language, the Arbitrator cannot sustain the position advanced by the Brotherhood.

For the foregoing reasons the grievance must be dismissed.

17 December 1993 **(sgd.) MICHEL G. PICHER**
ARBITRATOR