CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2533

Heard in Montreal, Thursday, 13 October 1994

concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The denial of job security benefits to CPET, Obico Terminal employee Joanna Lawrence.

UNION'S STATEMENT OF ISSUE:

On October 19, 1993, Ms. Joanna Lawrence applied for weekly layoff benefits under the supplemental Job Security Agreement.

The Union asserts that she was eligible for these weekly layoff benefits, as her position was abolished and there was no full time position for which she was "… senior and qualified …" available. she was therefore laid off.

The Company alleges that she is not entitled to weekly layoff benefits, as there were full time positions held by junior employees. Her inability to bump these positions was due to a medical condition, and her absence was therefore because of physical disability, and not a layoff.

The Union requests Ms. Lawrence receive weekly layoff benefits from the date of her application (October 19, 1994) [sic] to such time as she is able to obtain a full time position with the Company, or exhausts her benefit entitlement and any other benefits to which she would have been entitled.

The Company denies the Union's request.

FOR THE UNION:

(SGD.) D. J. DUNSTER
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel,
B. F. Weinert	– Director, Labour Relations, Toronto
D. Tarsay	– Manager, Personnel, Obico Terminal, Toronto

And on behalf of the Union:

F. Luce	– Counsel, Toronto
G. Rendell	– Divisional Vice-President, Toronto
A. Dubois	– Divisional Vice-President, Province of Quebec
J. Lawrence	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the grievor was employed as a data process clerk in the waybill room of the Obico Terminal until she was displaced from her position in May of 1992. She then sought to exercise her seniority by bumping to a warehouse position on the dock. In the normal course she was required to take a medical examination, the result of which disclosed that she had a limitation in respect of lifting which, it does not appear disputed, disqualified her from work in the warehouse. She was found to be unable to conduct repetitive lifting over ten pounds, whereas the Company requires that an employee in the warehouse be capable of repetitive lifting of up to fifty pounds or more. As a result, the grievor was placed on layoff status, which effectively commenced August 4, 1993, because she had the protection of Workers' Compensation Benefits from February 9, 1993 until that date. Ms. Lawrence's request for layoff benefits, made on October 19, 1993, was denied. Essentially, the position of the Company is that the grievor's loss of work was not occasioned by a layoff because of a reduction in the work force, but because of her physical disability which prevented her from holding available work in the warehouse.

A review of the history of the Job Security Agreement between the parties sustains the approach adopted by the Company with respect to the payment of the weekly layoff benefits provision found in article 2 of that agreement. Specifically, the Company's position is confirmed in a decision of the Joint Administrative Committee in respect of a railway employee made on January 29, 1969 and is further confirmed in two subsequent decisions of Arbitrator Weatherill sitting as a referee under the terms of the Job Security Agreement (awards dated January 16, 1978 and May 1, 1978).

In the award dated January 16, 1978, Arbitrator Weatherill found that an employee who did not exercise his seniority to displace another employee, by reason of a heart condition, was not entitled to the weekly layoff benefits under article 2 of the Job Security Agreement. At pp 6-7 of his award Arbitrator Weatherill commented as follows:

> The grievor was entitled, as we have seen, to sickness benefits, and he received such. When those expired, it was still open to him to exercise his seniority, but he did not do so, his physical condition (angina pectoris) remaining. It may be concluded, for the purposes of this award, that the grievor was physically unable to perform the work which would have been available to him had he exercised his seniority rights. It is, therefore, quite understandable that the grievor would not exercise seniority rights to claim such work. It does not follow, however, that the grievor was therefore relieved of the necessity of meeting the requirements of article 1 of Appendix B of the Job Security Agreement in order to obtain benefits thereunder.
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> Article 1(e) of Appendix B of the Job Security Agreement requires that an employee, to be eligible for benefits, have exercised full seniority rights on his basic seniority territory. There is no qualification for that requirement, and the grievor did not meet it. While the grievor's sickness makes his conduct understandable, it does not relieve him of the necessity of meeting the eligibility requirements. Indeed, as is clear from article 4(a) of Appendix B, employees absent by reason of sickness or injury are not to be regarded as laid off, and so are not eligible for job security benefits. An employee in the grievor's position, then, simply does not come within the scope of the Job Security Agreement. The arbitrator, of course, has no power to add to, subtract from or modify any of the terms of the agreement.
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> In the circumstances of this case, then, it cannot be said that the grievor was eligible for job security benefits under the terms of the Job Security Agreement. Accordingly, the grievance must be dismissed.

Insofar as the bargaining relation of the parties is concerned, the Arbitrator is compelled to conclude that the interpretation of the Job Security Agreement which has been followed by the Company in the case of Ms. Lawrence is one which was originally agreed and understood between the parties, which received arbitral sanction and which has continued without amendment to the present time. I am satisfied that at all material times, upon the renewal of the collective agreement and the Job Security Agreement after the Weatherill awards, the Union must be taken as having accepted the established application and interpretation of these provisions. Insofar as the collective agreement and Job Security Agreement are concerned, therefore, the Arbitrator cannot find any violation on the part of the Company. Its view that the grievor's inability to hold employment was not the result of a layoff, but rather the result of a physical disability, must be sustained.

At the arbitration hearing the Union also sought to argue that the collective agreement so interpreted would violate the terms of the **Canadian Human Rights Act**. Counsel for the Company objects that that position is not reflected in the ex parte statement of issue, which defines the jurisdiction of this Office.

Clause 12 of the memorandum of agreement establishing the Canadian Railway Office of Arbitration provides, in part, as follows:

> **12.** The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions. ...
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> The decision of the Arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

In the circumstances the Arbitrator is compelled to sustain the objection of the Company with respect to the raising of the issue of the **Canadian Human Rights Act**. The invoking of the **Canadian Human Rights Act** to nullify the terms of the Job Security Agreement is a separate and distinct issue from the interpretation of the agreement. I cannot accept the submission of Counsel for the Union that the fact that there was a passing reference to the **Act** in a letter exchanged during the course of the grievance procedure is sufficient to place that very separate issue before me for adjudication. It is, I think, a matter clearly beyond the interpretation of the four corners of the collective agreement, or of the Job Security Agreement, which is the only subject touched upon in the Union's ex parte statement of issue. Whatever rights the grievor may have in another forum in respect of that matter, I cannot find that it is within my jurisdiction to rule upon them, having regard to the terms of reference governing this Office's jurisdiction, and the ex parte statement of issue filed by the Union in this matter.

For the foregoing reasons the grievance must be dismissed.

14 October 1994

(signed) MICHEL G. PICHER
ARBITRATOR