CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2581

Heard in Montreal, Tuesday, 14 February 1995

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Employment security status of certain 'B' men affected by the Basic Track Mechanization Force (BTMF) project.

BROTHERHOOD'S STATEMENT OF ISSUE:

In April of 1993, the Company introduced its BTMF project through the medium of an article 8 notice. As a result of this change, numerous sections were abolished, new technology was introduced and many lay-offs occurred. Some 'B' men were named in the article 8 notice. However, some other 'B' men were not so named. As a result of the implementation of the BTMF, many of these 'B' men were forced to displace junior employees in other locations or were laid-off. The Company refused to recognize these employees as employment security employees with all the rights and obligations thereof.

The Brotherhood contends that: **1.)** All employees possessing more that eight years of cumulative compensated service, regardless of whether they hold permanent or temporary positions, are entitled to employment security status; **2.)** All employees with employment security status who are affected by an article 8 notice are entitled to the benefits of the Job Security Agreement; **3.)** The Company is in violation of articles 7 and 8 of the Job Security Agreement.

The Brotherhood requests that all 'B' men with more than 8 years of cumulative compensated service and who were adversely affected by the implementation of the BTMF be declared to be employment security employees with all the benefits and obligations provided thereby. The Brotherhood also requests that all such employees be compensated for all wages and benefits lost, and expenses incurred, as a result of this matter.

The Company denies the Brotherhood's contentions and declines its requests.

FOR THE BROTHERHOOD:

(SGD.) D. McCRACKEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Smith	– Labour Relations Officer, Montreal
D. T. Cooke	– Manager, Labour Relations, Montreal
G. D. Wilson	– Counsel, Montreal
R. A. deMontignac	– Manager, Benefits, Montreal
P. C. Leyne	– Engineer, Maintenace of Way and Development, Montreal
D. E. Guerin	– Assistant Labour Relations Officer, Montreal

K. E. Webb	– Manager, Labour Relations, Vancouver
R. Wedel	– Manager, Engineer Maintenance, Calgary
E. J. Matte	– Supervisor, Maintenace of Way, Toronto
P. A. Dolci	– Supervisor, Payroll and Staff Records, Montreal

And on behalf of the Brotherhood:

D. Brown	– Senior Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
G. D. Housch	– Vice-President, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg
P. Davidson	– Counsel, Ottawa
G. Beauregard	– Local Chairman, Montreal

AWARD OF THE ARBITRATOR

On the basis of the material before me, I am compelled to sustain the objection of the Company with respect to the arbitrability of this grievance. It is not disputed that the mandatory time limits within the collective agreement require the filing of a grievance within a period of 28 days. The grievance in the case at hand was filed on November 29, 1993, alleging a violation of the rights of trackmen 'B' in relation to the application of the Job Security Agreement and their entitlement to employment security status.

The grievance relates to the implementation of the Basic Track Maintenance Force (BTMF) reorganization. The Company issued an article 8 notice in respect of that initiative in April of 1993. The changes were conclusively implemented in different parts of the system on August 16, September 7 and 20, and October 3, 1993. The Arbitrator is satisfied, on the balance of probabilities, that the Brotherhood's officers were aware that the Company was implementing the BTMF in a manner that did not accord employment security or Job Security Agreement protections to trackmen 'B', who, by definition, occupied temporary positions. The uncontested evidence before me confirms that the Company's position was articulated on several levels. It was expressed at a meeting on June 2, 1993 by then Manager, Labour Relations, Steve Samosinski to four officers of the Brotherhood, including its Federation General Chairman. The same position was reiterated across the country at a number of informational sessions, referred to as "roadshows", at which Company officers explained the workings of the BTMF reorganization in the presence of a number of local and general chairmen. Lastly, beginning June 28, 1993 a number of joint committee meetings were held across Canada, involving general chairmen and local chairmen to implement the bids and assign employee positions under the reorganization. During the course of the process, during which any trackman 'B' bids which came through the system were rejected, no dispute was raised on the part of the Brotherhood in respect of the application of the Job Security Agreement, or of the employment security provisions in relation to those temporary employees.

The Arbitrator is satisfied that the Brotherhood knew, or reasonably should have known, at least as early as August 16, 1993, and no later than October 4, 1993 that the Company was refusing to accord employment security status to trackmen 'B', or to give them the benefits of the Job Security Agreement in pursuance of the article 8 notice. In the result, the grievance filed on November 29, 1993 must be found to be out of time, as it was filed in excess of 28 days from the action which is the subject of the grievance.

This is not a case which can be dealt with on the basis of an ongoing or continuing breach or a fresh event which can be said to renew the time limits. In the case at hand the Arbitrator is satisfied that the following comments of Arbitrator Christie in **Re Canada Post Corp. and Canadian Union of Postal Workers** (1993), 35 L.A.C. (4th) 300 are apposite:

> In the contest of the principal grievance before me, C.U.P.W. No. N00-91-00001, it is not strictly necessary for me to decide whether breaches by the employer of arts. 11, 12 and 13 would give rise to continuing grievances; breaches of the collective agreement that could be grieved at any time but remedial only for the time limited by whichever paragraph of art. 9.09 applied. However, because the matter was fully argued and considering what I have to say in relation to the next preliminary matter, I will address the issue.

Brown & Beatty, **Canadian Labour Arbitration**, 3rd ed., looseleaf, state in para: 2:3128:

> Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. They usually involve the non-payment of money, an illegal strike or benefit premiums, ***or the assignment of work*** … It has been suggested that the correct test is the one developed in contract law, namely, that there must be a recurring breach of duty, not merely recurring damages.(Emphasis added; footnotes omitted.)

The emphasized words certainly suggest that the sort of individual grievances, or properly defined group grievances, that would be likely to flow from the employer policy that is grieved here would be continuing grievances. On the other hand, the requirement that "there must be a recurring breach of duty" suggests the contrary conclusion. This test is drawn from the award of arbitrator Getz in **Re Province of British Columbia and B.C.N.U**. (1982), 5 L.A.C. (3d), quoting Gorsky, **Evidence and Procedure in Canadian Labour Arbitration** (1981), in a case that involved hiring the grievor into the wrong salary step. The learned arbitrator stated at p. 415:

> The duty to assess Mrs. William's experience was a single duty, not a recurrent one. The employer was under no obligation to make fresh assessments of that experience from time to time at periodic intervals. The decision that the employer reached in the discharge of its duty to assess, if wrong, no doubt has continuing consequences for her, in that each time she was paid a salary based on that wrong decision, she suffered harm. But that additional harm did not constitute a fresh breach of the employer's promise. To describe this as a "continuing breach" is, in my view, to deprive the concept of all meaning.

In *Re Port Colbourne General Hospital and O.N.A.* (1986), 23 L.A.C. (3d) 32, cited by counsel for the union, at p. 328 the majority of a board of arbitration chaired by Kevin Burkett stated:

> Allegations concerning … the improper awarding of a promotion … while they may have ongoing consequences, constitute discrete non-continuing violations of the collective agreement.

The key, in my opinion, is this. Time-limits are not put in collective agreements to suggest that where the time has expired no wrong has been done, which is why arbitrators always apply them reluctantly. They are there to allow a party acting under a collective agreement, usually the employer, to know where it stands after the lapse of the agreed time; until it takes a fresh step, with respect to which it must once again consider the consequences.

In the case before me the time-limits in the collective agreement do not mean that the employer could adopt the policy here in issue, wait 25 days and then administer the collective agreement in accordance with that policy free of any possibility of challenge through the grievance procedure. What they do mean is that the employer can rely on the fact that if there is no grievance within 25 days after it has made a particular promotion or work assignment based on the policy that action, and the consequences that flow automatically from it, cannot be grieved. However, the next such action based on the policy may be grieved and, of course, under this collective agreement there can be a policy grievance at any time.

In the case at hand the Company made its position known, and implemented its decision in a manner which permanently impacted employees in the bargaining unit commencing August 16, through October 4, 1993. The Company's actions were complete by the final date, and went ungrieved by the Brotherhood for a period substantially in excess of the 28 day time limit for filing a grievance. This is not, therefore, a matter in which the Brotherhood can claim ongoing or fresh violations of the rights of the employees who are the subject of its policy grievance as occurred in **CROA 2145**.

Finally, the Arbitrator cannot find that article 19.4 changes the merits of the dispute. It provides as follows:

> **19.4** The settlement of a grievance shall not under any circumstances involve retroactive pay beyond a period of 60 calendar days prior to the date such grievance was submitted to the immediate supervisory officer in accordance with Clause 18.6.

The Brotherhood submits that the foregoing provision reflects an understanding of the parties that grievances can be filed beyond the 28 day period provided in article 28.6. I cannot agree. The provision is intended solely to provide a limitation of liability, which would apply in the event of a timely grievance being found to be meritorious. Article 19.4 would address the circumstance where a violation of the provision of the collective agreement has gone on for a considerable period of time, perhaps years, before it is discovered and grieved by the Brotherhood. While the Brotherhood must file the grievance within 28 days of its becoming aware of the breach, its ability to successfully claim retroactive pay is limited, by agreement, to the period of sixty calendar days prior to the date the grievance is filed. So understood, article 19.4 cannot be construed as qualifying or amending the mandatory time limits provided in article 18.6 of the collective agreement.

For all of the foregoing reasons the Arbitrator is compelled to conclude firstly, that the Brotherhood's officers were aware of the actions of the Company in respect of the rights of trackmen 'B' at a time substantially in advance of 28 days prior to November 29, 1993. In the alternative, if it were necessary to so conclude, I would ground the same conclusion on the basis that they then reasonably should have been so aware, and that their acquiescence would, at a minimum, constitute a waiver of any contrary position. For all of these reasons the grievance must be found to be untimely, It is, therefore, not arbitrable and must be dismissed.

17 February 1995

(signed) MICHEL G. PICHER
ARBITRATOR