CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2866

Heard in Montreal, Wednesday, 11 June 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS

EX PARTE

DISPUTE – CCROU[UTU]:

Interpretation and application of maintenance of earnings.

DISPUTE – CCROU[BLE]:

Interpretation and application of the maintenance of earnings provisions as it relates to the Company's changes to the blocking system of assignments.

EX PARTE STATEMENT OF ISSUE – CCROU[UTU]:

On March 9, 1997, Mr. D. House wrote to this office regarding existing maintenance of earnings. Specifically, Mr. House stated that the Company was changing the way they calculated the blocking system and also stated that an employee would now be required to protect the Block which valued his/her maintenance of earnings.

On March 28, 1997, the Union filed a policy grievance with the Senior Vice-President at CN Rail stating that the Company was disregarding past practice and also past arbitration awards and therefore the Company could not support its new position.

The Company responded on April 28, 1997 to the Union's policy grievance, denying the Union's appeal.

The Union contends that the Company, by its new interpretation and application, has violated the provisions of maintenance of earnings in numerous agreements.

The Company disagrees with the Union.

EX PARTE STATEMENT OF ISSUE – CCROU[BLE]:

On March 9, 1997 the Company provided a letter to the Brotherhood, indicating that the "Blocking" used for purposes of maintenance of earnings was being revised. The Company also stated that the employees would now be required to protect the highest block of assignments that reflects the value of their maintenance of earnings.

Although the Company stated that the new "blocking system" would commence to be phased in at the spring changes of time, no terminals were identified. The Brotherhood only became aware of affected terminals after the Company notified the affected employees when bulletining the spring assignments.

The Brotherhood contends that the Company by its interpretation and application has violated article 78.13 of agreement 1.1, and other applicable agreements and understandings relating to maintenance of earnings.

The Company denied the grievance.

FOR THE COUNCIL:

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRPERSON, CCROU[UTU]

(SGD.) C. HAMILTON
GENERAL CHAIRMAN, CCROU[BLE]

(SGD.) R. LEBEL
GENERAL CHAIRPERSON, CCROU[UTU]

(SGD.) R. J. LONG
GENERAL CHAIRPERSON, CCROU[UTU]

There appeared on behalf of the Company:

G. Search	– Labour Relations Officer, Toronto
A. E. Heft	– Manager, Labour Relations, Toronto
J. Coleman	– Counsel, Montreal
D. T. MacKenzie	– Labour Relations Officer, Toronto
B. Hogan	– Manager, Workforce Strategy, Toronto
D. K. House	– Superintendent, Special Duties, Moncton
P. Parker	– Operation Service Leader, Moncton

And on behalf of the Council:

H. F. Caley	– Counsel, Toronto
M. P. Gregotski	– General Chairperson, UTU, Fort Erie
W. G. Scarrow	– Vice-President, UTU, Ottawa
R. J. Long	– General Chairman, UTU, Brantford
R. Lebel	– General Chairman, UTU, Quebec
D. Anderson	– Secretary, UTU, London
G. Bird	– Vice-General Chairman, UTU, Montreal

AWARD OF THE ARBITRATOR

The Council objects to the changes in the blocking system utilized for the administration of maintenance of earnings payments which was implemented by the Company at a number of terminals in the Eastern Region at the spring change of timetable in 1997. The provisions of the collective agreement which are in dispute were part of a memorandum of agreement made between the parties in May of 1995 governing collective agreements 4.16, relating to Conductors and Assistant Conductors, and 1.1 relating to Locomotive Engineers. The maintenance of earnings provisions in articles 78 and 79 respectively include, in part, the following:

> **78.13/79.13 Maintenance of Earnings**
>
> **(b)** The basic weekly pay of employees whose positions are abolished or who are displaced shall be maintained by payment to such employees of the difference between their actual earnings in a four-week period and four times their basic weekly pay. Such difference shall be known as an employee's incumbency. In the event an employee's actual earnings in a four-week period exceeds four times his or her basic weekly pay, no incumbency shall be payable. An incumbency for the purpose of maintaining employees' earnings, shall be payable provided:
>
> **(1)** in the exercise of seniority, they first accept the position with the highest earnings at their home terminal to which their seniority and qualifications entitle them. Employees who fail to accept the position with the highest earnings for which they are senior and qualified, will be considered as occupying such position and their incumbency shall be reduced accordingly. In the event of dispute as to the position with the highest earnings to which they must exercise seniority, the Company will so identify;
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> **(2)** they are available for service during the entire four-week period. If not available for service during the entire four-week period, their incumbency for that period will be reduced by the amount of the earnings they would otherwise have earned; and
>
> **(3)** all compensation paid an employee by the Company during each four-week period will be taken into account in computing the amount of an employee's incumbency.

NOTE: Employees will be allowed to book up to and including 12 hours rest (exclusive of calling time) without affecting their incumbency.

...

(e) The payment of an incumbency, calculated as above, will continue to be made:

(1) as long as the employee's earnings in a four-week period is less than four times his or her basic weekly pay;

(2) until the employee fails to exercise seniority to a position, including a known temporary vacancy of ninety days or more, with higher earnings than the earnings of the position which he or she is holding and for which he or she is senior and qualified at the station where he or she is employed; or

NOTE 1: In the application of sub-paragraph (e)(2), an employee who fails to exercise seniority to a position with higher earnings, for which he or she is senior and qualified, will be considered as occupying such position and his or her incumbency shall be reduced correspondingly. In the case of a known temporary vacancy of ninety days or more, his or her incumbency will be reduced only for the duration of that temporary vacancy.

NOTE 2: The words "position with higher earnings" do not include a position on which the earnings are higher than the earnings of the position from which displaced.

(3) until the employee's services are terminated by discharge, resignation, death or retirement.

Much of the dispute in the instant grievances arises in respect of the interpretation of Note 2 to article 78.13/79.13 (e)(2). A review of the Company's expenditures for maintenance of earnings caused it to rethink the manner in which the blocking system is administered. Since the inception of the concept of maintenance of earnings, generally attributed to the special agreement of 1979 relating to the establishing of VIA Rail, employers and unions in the railway industry have recognized that administering the obligation of employees to protect certain categories of work as a condition of maintaining their maintenance of earnings entitlement would be facilitated by establishing certain "blocks" within which employees must protect work. Consequently, for close to twenty years, an arrangement has developed whereby the Company has established blocks of positions. Generally, the blocks tended to correspond to the position and class of service from which the employee was displaced as a result of a job abolishment. For example, an assistant conductor in through freight service was generally required, as a first condition of maintaining his or her maintenance of earnings entitlement, to bid on a block of positions generally corresponding to the same type of work. The uncontradicted representation of the Council is that as the system evolved in the early 1980s, blocks were established pursuant to discussions between the parties, based on different classifications and assignments. For example, under the previous United Transportation Union collective agreement, blocks would relate to the positions of conductors, brakepersons or assistant conductors and would also be framed in relation to types of assignments, such as through freight, road switcher, wayfreight, yard foreman, yard helper or spareboard. On that basis some nine different classifications of UTU members were to be found within the blocks. However, because of the similar earning potential of certain of the block designations, different positions and assignments could sometimes be placed within the same block, for example, the positions of yard helper and spareboard.

As appears from the material before the Arbitrator, historically the blocks were partly established on the basis of the wage guarantee which might relate to a particular position or assignment. By way of example, the following table illustrates the average earnings over twenty-eight days, the guarantee and the block positioning of certain employees within the UTU's ranks in the 11th District in Montreal, as well as the location of the position with the new blocking system.

MONTREAL 11TH DISTRICT
Average Earnings of Block 3 = $3819.24

Assg. ID	Average Earnings 1996	Guarantee Amount	1996 Block	1997 Block
MS01 CO	5000.30	4390.76	3	5

MS02 CO	5059.21	4390.76	3	5
OM1T64 CO	4703.10	4069.44	3	8
OM1T87 CO	5732.76	4069.44	3	3
OM1T26 CO	3409.84	4069.44	3	8
OM1T45 CO	3942.26	4069.44	3	8
OM1T47 CO	3287.44	4069.44	3	8
OM1T49 CO	3328.53	4069.44	3	8
OM1T54 CO	3319.21	4069.44	3	8
OM1T57 CO	3348.98	4069.44	3	8
OM1T60 CO	3237.60	4069.44	3	8
XM1T01 CO	3346.75	4069.44	3	8

In a letter dated March 9, 1997 the Company's Superintendent, Special Duties, Mr. D.K. House, corresponded with the General Chairs of the Council for the Eastern Region in the following terms:

> Gentlemen;
>
> We have not done a revision of the Blocks established for the administration of maintenance of earnings for several years. In the intervening time much has changed which has, in many cases, made the present Blocks unrepresentative of the underlying value of the jobs which they were intended to represent. There is little consistency in the structure of the Blocks between terminals and in some cases a single block has come to represent an inappropriately large spread of job values.
>
> To remedy this situation and give us a system of Blocks which can be applied uniformly across Eastern Canada we will be introducing a revised system starting with the spring change of card 1997. We propose to have 10 Blocks graduated by $300.00 increments as follows:
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> | BLOCK | VALUE |
> |---|---|
> | 1 | $6200 and up |
> | 2 | $5900 to 6199 |
> | 3 | $5600 to 5899 |
> | 4 | $5300 to 5599 |
> | 5 | $5000 to 5299 |
> | 6 | $4700 to 4999 |
> | 7 | $4400 to 4699 |
> | 8 | $4100 to 4299 |
> | 9 | $3800 to 4099 |
> | 10 | LESS THAN $3800 |
>
> These value ranges may be subject to some adjustment prior to implementation.
>
> We would assign all jobs to the appropriate Block at each terminal by job earnings. This would mean that a given terminal might have Block 2 - Block 6 - Block 8 jobs only. An employee would identify the highest Block he would be required to protect by comparing the value attached to the block with the value of his maintenance of earnings. This should make it simple for everyone to deal with and uniform from terminal to terminal.
>
> As there is a lot of work involved we will be phasing this in over the Spring and Fall Changes of time.
>
> (signed) D.K. House
> Superintendent Special Duties - OSC

As is evident from the foregoing, the Company's implementation of a 10 block system based purely on monetary value represents a change in the method establishing blocks for the purposes of maintenance of earnings. The previous blocking system, in place for some thirteen years, over a number of collective agreements, established bidding blocks for the purposes of maintenance of earnings protection based on a combination of factors, including the employee's classification (i.e., conductor, assistant conductor), assignment (i.e., through freight, road switcher, etc.) and the wage guarantee which attached to the job in question. The new blocking system focuses solely on the

monetary value of a job, in terms of earning potential, based on wages to be earned in a twenty-eight day period. According to the new formula devised by the Company, for example, an employee whose incumbency would fall within the range of $4,100 to $4,299 would be compelled to protect any available work within block 8, whereas an employee with incumbency of $5,900 to $6,199 would be required to protect any available work in block 2 for which he or she might be qualified, regardless of the nature of the assignment.

The Council submits that the Company's new blocking system violates the terms of articles 78.13/79.13(e)(2), as qualified by Note 2. According to its interpretation, Note 2 intends that an employee not be compelled to protect a position which is more highly paid than the position from which the employee was originally displaced. For instance, its Counsel submits that a conductor in road switcher service could not be compelled to protect the more highly remunerated position of a conductor in through freight service, as a condition of protecting his or her maintenance of earnings. Counsel for the Council stresses that the new blocking system has had substantial negative impacts on employees who are compelled to protect their maintenance of earnings incumbencies. By way of example he draws to the Arbitrator's attention a substantial number of employees who have for many years operated passenger commuter trains in Montreal who, by reason of the new blocking system, have been forced to take other positions in away from home road service, causing substantial changes to their established life-styles. The Council also relies on the decision of this Office in **CROA 2676**, an award involving **VIA Rail Canada Inc. and the United Transportation Union**, as being in support of its position.

It appears to the Arbitrator that this dispute must be approached on two grounds. The first matter to examine is the interpretation of the language of the collective agreement, and in particular of articles 78.13/79.13(e)(2). The second issue to be considered is whether the principle of estoppel should operate, should the Company's interpretation of these provisions be correct.

On the issue of contract interpretation the Arbitrator has some difficulty with the arguments made by the Council. Firstly, it should be stressed that the parties have not made the blocking system an express part of the collective agreement. For the purposes of administering maintenance of earnings payments the Company has, with the acquiescence of the Council, and in earlier years its two constituent members, the Brotherhood of Locomotive Engineers and the United Transportation Union, established blocks for the purposes of bidding work to protect an employee's incumbency entitlement. As is clear from the material before the Arbitrator, in the administration of Note 2, the word "position" has never been taken to mean simply a classification, such as conductor or locomotive engineer. It is common ground that the parties have, in part, looked also to assignments as a means of establishing positions within the blocks. Accordingly, employees with incumbencies were slotted within the blocks depending on such factors as whether they worked in road service or yard service and, still more narrowly, whether they were in through freight or road switcher service or, if they worked in a yard, whether they were a yard foreman or a yard helper. Additionally, apart from the amalgam of elements considered, to some degree job valuation was factored into the framing of blocks. By the Council's own submission, for example, yard helpers and spareboard employees were included in the same block, based on the rough equivalence of earnings potential in either position.

When the history of the blocking system is reviewed, the Arbitrator is satisfied that the parties did intend, in framing the language of Note 2, that in establishing blocks the Company would be entitled to consider a number of factors, and that the earnings potential of a given assignment could be utilized for that purpose. There is, very plainly, nothing on the face of the language of sub-paragraph (e)(2), nor of Note 2, which would confine the Company to establishing blocks on the basis of job classifications, such as conductor or yard helper, or indeed of assignments, such as through freight or road switcher. Most significantly, the Arbitrator can see nothing in the language of these provisions which would prevent the Company from asserting the interpretation which it does in respect of the interpretation of sub-paragraph (e)(2). The language of that provision plainly contemplates that to protect his or her incumbency an employee must exercise seniority to a position with higher earnings than the earnings of the position currently held, subject only to the proviso that the position which must be bid need not be a position with earnings higher than the earnings attributable to the position upon which the incumbency was originally based. The thrust of the language, so understood, is not primarily focused on positions, but rather on earnings, and relative levels of earnings. In the result, I can see nothing within the language of these provisions which would prevent the Company from establishing a blocking system based on the earnings potential of various assignments, as it has in fact done. That would, in my opinion, be entirely consistent with the language of the provision and, just as significantly, with the history of its administration over the years, without objection from the Council, or either predecessor Union. Indeed, it does not appear disputed that on occasion the Council has been substantially involved in discussing the relative evaluation of assignments for the purposes of establishing and occasionally adjusting

maintenance of earnings blocks. On the basis of contract interpretation, therefore, the Arbitrator is compelled to sustain the position of the Company.

On the issue of estoppel, an alternative advanced by the Council, the position of the Company is less persuasive. Maintenance of earnings protection, and the administration of maintenance of earnings by the employer, represent a job security right of considerable importance to employees. The purpose and importance of maintenance of earnings has been extensively commented upon previously by this Office, and need not be reiterated (see, e.g., **CROA 2269**). It is safe to say that as the Council and its predecessor unions negotiated and re-negotiated their collective agreements over the years, the maintenance of earnings protections of all running trades employees, and the manner in which those protections have been administered, constituted critical background to any bargain negotiated, or outcome arbitrated, in the renewal of their collective agreement. As a general rule, the Council had little or no reason to expect any radical change in the administration of the blocking system. In the negotiations leading to the current collective agreement the Company did make a proposal to amend the maintenance of earnings provisions of the collective agreement, notably to require that an employee must bid the highest rated position to retain his or her incumbency. That position was rejected by the Council and was not awarded by a board of interest arbitration. While the Council may well have appreciated that the Company had concerns for the ongoing costs of maintenance of earnings, it was never placed in a position to discuss or negotiate any substantial change in the method by which maintenance of earnings blocks would be established or administered. In the circumstances, the Council proceeded to the renewal of the collective agreement in reasonable reliance on the continued application of the maintenance of earnings system as it had operated for over a decade.

For the reasons related above, the Arbitrator is satisfied that the strict application of the provisions of article 78.13/79.13(e)(2) would allow the Company to move to an entirely value based system of blocks for the purposes of administering the maintenance of earnings obligations of employees. Just as plainly, however, for many years, over the renewal of several collective agreements, the Company did not rely on the strict enforcement of the terms of these provisions, opting instead for a more generous approach to blocking which gave more costly protections to the employees represented by the Council. The new value based blocking system is a radical change in the application of articles 78.13/79.13(e)(2), albeit one which is permissible. In the absence of any indication during the course of bargaining, or at interest arbitration, that the Company intended to revert to a much stricter interpretation and application of these provisions, I am satisfied that the equitable doctrine of estoppel must apply to the prevent the Company from implementing the newly established blocking system, at least until such time as the current collective agreement should expire, and the parties are remitted to the fullest opportunity to bargain in relation to this issue. Needless to say, should they be unable at that time to reach any agreement, and should the collective agreement be renewed without material change in its language in respect of the maintenance of earnings provisions, the Company will then be at liberty to administer the blocking system in a manner consistent with the system described the Company's letter of March 9, 1997, reproduced above.

In summary, the Arbitrator finds, as a matter of interpretation, that the blocking system proposed by the Company is consistent with the language of the collective agreement. Given the history of this provision, however, and the failure of the employer to raise the matter in these terms during the last round of bargaining, the Arbitrator finds and declares that the Company is estopped from reverting to a strict interpretation and implementing the new blocking system during the currency of the existing collective agreement. The Arbitrator further directs that employees who may have suffered adversely by losing their incumbencies be compensated, and that employees who were adversely forced to protect certain higher positions at some locations be given the opportunity to re-bid their assignments. The Arbitrator directs that the parties consult together forthwith with respect to the implementation of these directives, and retains jurisdiction in the event of any dispute between the parties having regard to the interpretation or implementation of this award.

June 20, 1997

(signed) MICHEL G. PICHER
ARBITRATOR