CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2881

Heard in Montreal, Tuesday, 9 September 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE – BROTHERHOOD:

Claim on behalf of Z.M. Bodnar, PIN 772670, J.J. Chapman, PIN 213498, J.B. Costa, PIN 135376, T.L. Donato, PIN 172322, K. Dunlop, PIN 771806, D.R. Dyck, PIN 177126, D. Gevoga, PIN 882455, M.C. Hebert, PIN 771865, M. Madill, PIN 772669, K.T. McKechnie, PIN 172372, B.McNaughton, PIN 771781, D.A. Nachtigall, PIN 170448, J.S. Priestley, PIN 172368, D.R. Richardson, PIN 175100, G.D. Ross, PIN 884487, A.F. Santos, PIN 135478, R.C. Scarello, PIN 807497, M. Seneschen, PIN 772668, S.S. Shwaluk,e, PIN 869967, M. Tschetter, PIN 869838, G.J. Zommer, PIN 884498 and R.C. Zuk, PIN 870057, adversely affected by an Article 8 change, who were denied the ability to choose an option other than Option 5 of Article 7.14 of the Employment Security and Income Maintenance Agreement (ESIMP).

DISPUTE – COMPANY:

Claim on behalf of Z.M. Bodnar, PIN 772670, J.J. Chapman, PIN 213498, J.B. Costa, PIN 135376, T.L. Donato, PIN 172322, D. Gevoga, PIN 882455, M. Madill, PIN 772669, K.T. McKechnie, PIN 172372, B.McNaughton, PIN 771781, D.A. Nachtigall, PIN 170448, J.S. Priestley, PIN 172368, R.C. Scarello, PIN 807497 and M. Seneschen, PIN 772668, who were affected by an Article 8 change, and who were denied the ability to choose Options 1 - 4 of Article 7.14 of the Employment Security and Income Maintenance Agreement based on the provisions of article 7.13 b), Note 2.

STATEMENT OF ISSUE – BROTHERHOOD:

In the summer of 1996, the Company implemented an article 8 notice that resulted in an adverse effect on bargaining unit members. The grievors chose to be governed by Section (B) of the ESIMP, Article 7. However, the Company refused to allow them to choose any of the Section (B) options set out in article 7.14, other than option 5. The Brotherhood disagreed with the Company's actions and took the position that the grievors could choose any of the five options they desired.

The Union contends that the Company's position is in violation of ESIMP article 7 in general and articles 7.10, 7.13 and 7.14 in particular.

The Union requests that it be declared that the Company's position is invalid and that it be ordered that the grievors be permitted to exercise any article 7.14 option they choose and that they be made whole for any loss incurred as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

STATEMENT OF ISSUE – COMPANY:

In the summer of 996, the Company implemented an article 8 change that resulted in a number of employees being affected and electing whether to be governed by Section A - System Requirements, Article 7.1, or Section B - Enhanced Supplementary Unemployment Benefit and Alternative Options, Article 7.13, of the Employment Security and Income Maintenance Agreement.

A number of employees elected to be governed by Section B of the ESIMP, and exercised their seniority in accordance with same. Late in 1996, the grievors became unable to hold a position, and in accordance with Note 2 of Article 7.13 b) of the ESIMP, the grievors were denied the ability to choose any of the Section B options, other than Option 5. The Brotherhood disagreed with the Company's position and took the position that the grievors could choose any of the five options that they desired.

The Brotherhood contends that the Company's position is in violation of ESIMP article 7 in general and articles 7.10, 7.13 and 7.14 in particular.

The Brotherhood requests that it be declared that the Company's position is invalid and that it be ordered that the grievors be permitted to exercise any article 67.14 option they choose and that they be made whole for any loss incurred as a result of this matter.

The Company denies the Brotherhood's contentions and declines the Brotherhood's request.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. F. LIBERTY	(SGD.) J. TORCHIA
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Blackmore	– Labour Relations Officer, Edmonton
J. Torchia	– Manager, Labour Relations, Edmonton
N. Dionne	– Manager, Labour Relations, Montreal
J. Coleman	– Counsel, Montreal

And on behalf of the Brotherhood:

P. Davidson	–Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg
D. Brown	– Sr. Counsel, Ottawa
R. A.Bowden	– System Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

The facts pertinent to this grievance are not in dispute. The grievors are individuals who have occupied permanent jobs, on a year round basis, within the meaning of article 7.17(a) of the Employment Security and Income Maintenance Plan (ESIMP). On August 30, 1996 they were adversely impacted by an operational or organizational change implemented by the Company, in conformity with a notice duly given under article 8 of the ESIMP. The employees in question were then faced with two options under the terms of the plan. They could elect the benefits of employment security, under section A of article 7 of the plan, an extensive benefit which involves equally extensive obligations to protect available work on a system basis. Alternatively, they could, as indeed they did, elect the option of section B of article 7, which involves somewhat different obligations to protect work, and in the event of the inability to hold work the following five options:

Option 1: enhanced early retirement separation allowance,

Option 2: bridging,

Option 3: severance payment,

Option 4: educational leave, or

Option 5: enhanced supplemental unemployment benefit.

The following provisions of section B of article 7 of the ESIMP are pertinent to the resolution of this dispute:

> **7.13 a)** When employees defined in Article 7.17 a) and b), who commenced service prior to January 1, 1994, and have eight or more years of cumulative compensated service, and are affected by a change pursuant to Article 8.1 of the Plan and elect not to fulfill the obligations under Article

7 Section A) of the Plan, will be required, on a continuous basis, to do the following in order to become and remain eligible for the benefits contained in this Article 7 Section B) of the Plan.

b) Employees defined in Article 7.17 c) and d) who commenced service prior to January 1, 1994, and have eight or more years of cumulative compensated service, and are affected by a change pursuant to Article 8.1 of the Plan will be required, on a continuous basis, to do the following in order to become and remain eligible for the benefits contained in Article 7 Section B) of the Plan.

(i) fully exhaust seniority in their own classification at their location, if unable to hold work,

(ii) fully exhaust seniority in their own Supplemental Agreement on their region, if unable to hold work,

(iii) fully exhaust seniority on their region, in other Agreements supplemental to Agreement 101 in which the employee in question holds previously established seniority; if unable to hold work,

(iv) fully exercise consolidated seniority in accordance with the terms of Appendix "D" attached hereto; if unable to hold work,

Note 1: Relocation benefits will be triggered only when permanent vacancies are filled or when an employee displaces onto a permanent position.

Note 2: For employees covered by Article 7.17 a) and b), option 1, 2, 3 and 4 pursuant to Article 7.14 will be triggered on the effective date of implementation of the change.

The employee whose name appears on the notice may choose Option 2 prior to accepting work in another bargaining unit.

Any employee may chose Options 1 or 3 prior to accepting work in another bargaining unit.

(v) fill permanent vacancies in other bargaining units, non-scheduled or management positions at their home location; if unable to hold work,

Note: Any employees may choose Options 1, 3 or 4 prior to accepting work outside CN.

(vi) accept work outside of CN at the home location as determined by the Labour Adjustment Committee; if unable to hold work,

(vii) After exhausting (i) through (vi), the employee, if eligible, will be required to exercise one of the following options:

…

(emphasis added)

Article 7.14 then goes on to articulate the five options listed above.

It is common ground that after August 30, 1996 the grievors were able, by the exercise of seniority, to hold seasonal or temporary positions. When that work came to an end, they sought to exercise the full range of options available under article 7.14. The Company then took the position that they were not entitled to do so, but were limited to option 5, the enhanced supplemental unemployment benefit. The Brotherhood disputes that interpretation.

In support of its position the Company relies on the wording of Note 2 to article 7.13. It asserts that the ability to elect options 1 through 4 would have been available to the employees only if they had been unable to hold work by the exhaustion of all of the requirements (i) through (vi) listed within the plan, as determined on the date the operational or organizational change was implemented. In other words, by the Company's interpretation, the ability to elect options 1 through 4 can be available to employees only on a one-day basis, as of the date of implementation of an operational or organizational change, and cannot be invoked at a later date when, as in the case at hand, the employee finds himself or herself unable to hold work. It is not disputed that the Company's interpretation would involve a departure from the traditional means by which co-relative obligations and benefits have been administered under employment security income maintenance agreements within the industry. Its representatives submit that the rationale for the provision is to protect the Company against contingent liability which would result from the

migration of permanent staff into temporary or seasonal work at the time of the implementation of an operational or organizational change, with the impact of the change coming only at the termination of the temporary or seasonal work which the affected employees were obliged and able to secure.

Counsel for the Brotherhood submits that the language of the ESIMP, and in particular the language of section B, is inconsistent with the position of the Company. He stresses, for example, that article 7.13b) speaks expressly of the obligation of employees being required "on a **continuous** basis" to fulfill certain obligations "… in order to become **and remain** eligible for the benefits contained in Article 7 Section B) of the Plan." In other words, he argues, on its very face the plan contemplates an ongoing set of obligations and a continuing co-relative eligibility for benefits. The freezing of benefit options in time as of a single day is, he submits, neither consistent with the general intention of the plan, nor reflected in its language. By the Brotherhood's interpretation Note 2 has as its primary purpose to identify that options 1, 2, 3 and 4 are to be limited to employees covered by article 7.17 a) and b), which is to say employees occupying permanent jobs or considered as occupying such jobs. Secondly, the Brotherhood argues that the "effective date of implementation" referred to within in the note must be taken to mean the date upon which an employee is himself or herself adversely impacted by the change. In the case of the grievors, that would be the point at which they cease to be able to hold work.

Upon a review of the scheme of article 7 of the ESIMP, taken as a whole, as well as the specific language of article 7.13, as well as Note 2, the Arbitrator has substantial difficulty with the position argued by the Company. From a purposive point of view, the operation of the provision is extremely dubious. Firstly, it is evident that the parties intended that employees who do not hold permanent jobs, or are not deemed to hold permanent jobs, are not to have the benefits of options 1 through 4. Articles 7.17 c) and d) specifically provide that employees working on temporary jobs or on seasonal positions are to be limited to option 5. It is virtually axiomatic that in a reduction of permanent positions within maintenance of way forces, the most senior employees will continue to hold work by virtue of their ability to displace into temporary or seasonal positions. If the Company's interpretation of Note 2 is correct, the operation of article 7 of the ESIMP would virtually ensure that the senior-most permanent employees are deprived of any access to options 1 through 4, by reason of the very fact of their longer service to the Company, and supposedly enhanced status. They would, in other words, almost automatically be forced into a situation which relegates them to the lesser rights of temporary or seasonal employees in the event of an operational or organizational change which adversely affects them. While a result of that kind might be the mutual intention of the parties, an arbitrator should require clear and unequivocal language within the terms of the ESIMP to conclude that such an counter-intuitive result was intended. Nor is it apparent to the Arbitrator that the Brotherhood's interpretation, involving as it does the postponing of the exercise of these options for the relatively brief period of a temporary position or seasonal employment, is necessarily an unmanageable or unduly burdensome obligation for the Company.

I must agree with Counsel for the Brotherhood that the use of the phrases "on a **continuous** basis" and "to become and **remain** eligible for the benefits contained in Article 7 Section B of the Plan" connotes an ongoing process of commensurate obligations and benefits. If the parties had intended that in fact after the implementation date the only benefit for which an employee can remain eligible after continuously exhausting his or her seniority to hold various levels of work is option 5 of article 7.14, they could have so expressed themselves in simple and direct terms. Opting for the plural expression "… remain eligible for the **benefits** contained in Article 7, Section B of the Plan" connotes something more.

The above conclusion is supported when regard is had to article 7.8 of the ESIMP. That article appears under section A, which concerns the separate obligations of employees who opt to protect work on a system basis in exchange for the benefits of employment security. It provides, as follows:

> **7.8** Except in case of bona fide leave of absence for injury or sickness, employees electing to be covered by the benefits contained in this Article 7 Section A), who at any time, fail to meet the requirements outlined in Article 7.1 (e), (f) or (g) will forever forfeit entitlement to benefits under Article 7 Section A) of the Employment Security and Income Maintenance Agreement. **Such employees may however, at that time, opt to receive the benefits contained in Section B) of this Article.** Article 7 Section B) benefits will be reduced by any wages received under Article 7 Section A). (emphasis added)

If the Company's interpretation is correct, employees who fail to protect their employment security at some time subsequent to the implementation of the change which gave rise to their entitlement to benefits will in fact be foreclosed from the options available under Section B) of the article, with the exception of enhanced supplemental unemployment benefits provided in option 5. That, however, is not consistent with the language of article 7.8 which, like article 7.13 b) speaks to "benefits" in the plural, indicating that the range of options listed under section B is to then be fully available to the employees in question. Further, the provision that section B benefits are to be "reduced by any wages received under article 7 section A" suggests that something more than supplemental unemployment benefits are to be available, including separation allowances, bridging rates and severance payments, albeit they are to be reduced on the basis of wages received.

Upon a review of the totality of these provisions I am persuaded that the language of Note 2 is far too cryptic and unclear to achieve the purpose which the Company submits was intended. Firstly, for the reasons related above, that purpose would be tantamount to providing the lowest order of benefits to the Company's senior-most permanent employees. I am not, however, persuaded that the Brotherhood's view of the meaning of the phrase "effective date of implementation" is entirely correct. I am inclined to agree with the Company that the "change" referred to in Note 2 must have reference to the change pursuant to article 8 described in article 7.1 of the ESIMP. Absent any more clear elaboration, however, I cannot conclude that Note 2 can be given any greater significance than to make clear that the first four options are to be available only to employees working on permanent jobs or considered as occupying such jobs, and that the word "triggered" means that the options in question cannot be invoked prior to the date of implementation of the change. There is nothing in the language of the note, however, including the use of the word "triggered" to suggest that the election of the first four options is to be limited to a one day exercise.

For all of the foregoing reasons the grievance is allowed. The Arbitrator declares that the Company's interpretation of Note 2 is incorrect, and directs that the grievor be permitted to exercise their options, including options 1 through 5 as set out in article 7.14 of the ESIMP. They are further to be compensated for any wages and benefits lost.

September 19, 1997

(signed) MICHEL G. PICHER
ARBITRATOR