CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2903

Heard in Calgary, Tuesday, 11 November 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Messrs. R. Cannaughton and P. Eckland.

BROTHERHOOD'S STATEMENT OF ISSUE:

Since 1993, the grievors have fallen within the scope of article 7.8 of the Job Security Agreement. The Company takes the position that when the grievors' five year protection ends they will not be permitted to exercise their seniority by displacement, but may only bid for bulletined positions. The Company further maintains that the grievors, at the end of their five year protection, will not be entitled to relocation benefits as provided for in the JSA. The Brotherhood disagrees with the Company's interpretations.

The Union contends: **1.)** Employees, at the conclusion of their article 7.8 protection, must exercise their seniority in conformity with the collective agreement. This includes the right to displace; **2.)** The grievors are entitled to all relocation benefits pursuant to the JSA when their article 7.8 protection concludes; **3.)** The Company's interpretation is in violation of articles 7.3 ands 7.8 of the JSA.

The Union requests that: it be declared that the Brotherhood's interpretations are correct and that the grievors are entitled to displace at the end of their five year protection and are likewise, at that time, entitled to all relocation expenses provided for under the JSA. The Brotherhood further requests that the grievors be compensated for any wages lost as a result of their not being allowed to displace into higher classifications.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Manager, Calgary
E. J. MacIsaac	– Labour Relations Officer, Calgary
S. Samosinski	– Labour Relations Director, Calgary
D. Cooke	– Labour Relations Manager, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. Brown	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
Wm. Brehl	– General Chairman, Pacific Region, Revelstoke

AWARD OF THE ARBITRATOR

This dispute concerns the rights of an employee to the protections of article 7.8 of the Job Security Agreement, which provides as follows:

> **7.8** An employee shall not be required to relocate if he has within the preceding 5 years been required to relocate under the provisions of the ES plan or has voluntarily elected to transfer with his work. This protection will not apply if the employee is eligible, or becomes eligible, for bridging or early retirement benefits.

The foregoing article takes its origins from an arbitration award of Arbitrator Dalton Larson, dated December 11, 1987. The article, which came to be known as "Larson protection" was conceived to provide a measure of shelter against forced relocation for employees who had previously been required to relocate. The grievors in the instant case fell under the provisions of Larson protection and, upon its expiry, sought to exercise their seniority to move from their Larson protected leading track maintainer's positions to the higher rated positions of track maintenance foremen, positions which they held at the time of the technological, operational and organizational change which originally impacted them in 1993.

The issue is whether the Job Security Agreement, when read together with the collective agreement, contemplates employees being able to leave Larson protected positions at the conclusion of the five year period, in circumstances where there are no vacancies to which they can exercise their seniority. The Brotherhood claims that the employees in question are entitled to exercise seniority by displacing to higher rated positions, including in other locations, with an entitlement to relocation expenses as contemplated under the Job Security Agreement. The Company's position is that by electing Larson protection the employees have already fully exercised their seniority rights under the provisions of article 7.3 of the Job Security Agreement, and cannot, five years after the fact, engender what it describes as a second chain of displacement to avail themselves of fresh bumping and relocation rights. In the Brotherhood's submission the Company's position creates anomalies as it is agreed, for example, that an employee unable to hold any work whatsoever, who remains idle on employment security protection for the period of five years, is nevertheless entitled, and indeed obligated, to exercise seniority, and displace into the highest rated position such as his seniority would allow, at the expiry of the five year period.

While the Arbitrator can appreciate the perspective which motivates the Brotherhood's grievance, based as it is upon a general belief that senior employees should be entitled to protect the highest rated work, there is very simply no language within the Job Security Agreement, or the collective agreement, which supports its position. The Arbitrator cannot accede to the Brotherhood's suggestion that the language of article 7.3 of the Job Security Agreement, which speaks in sub-paragraph (a) of an employee's obligation to protect his or her employment security "on an ongoing basis" by exercising seniority rights in accordance with a sequential list of obligations, including exercising seniority rights on their basic seniority territory in accordance with the collective agreement, or filling unfilled permanent vacancies either at their headquarters, on the basic seniority territory, on the region and, finally, either exercising seniority on the region to displace a junior employee or consolidated seniority on a regional basis, supports its position.

Upon a careful review of the Job Security Agreement, as well as the collective agreement, the Arbitrator is unable to accept the interpretation advanced by the Brotherhood. I am satisfied both in the intention of Arbitrator Larson, and in the operation of the present Job Security Agreement, article 7.8 was intended as a qualification to the obligations found under article 7.3. Specifically, it relieves certain defined employees against the relocation obligation contained in article 7.3. There is, however, nothing within the language of the provision, or of the scheme of the Job Security Agreement generally, which would suggest that the employee who invokes the protection of article 7.8 can notionally return to the starting point of the exercise at the expiry of five years, with the right, at that time, to invoke anew the ability to displace, whether locally or regionally, into a position occupied by a junior employee.

The situation at hand is to be contrasted with the reversionary rights which the parties did contemplate, and provide for, in another circumstance in their collective agreement. For example, article 15.4 of the collective agreement specifically provides for employees to return to their previously abolished positions, when they are re-established within a period of eighteen months. That provisions provides as follows:

> **15.4** A Trackman "A"/Track Maintainer, Leading Track Maintainer, Assistant Track Maintenance Foreman, or Track Maintenance Foreman whose position is abolished shall within 15 calendar days displace a junior employee in his classification. **An aforementioned employee** (Trackman/ Track Maintainer, Leading Track Maintainer, Assistant Track Maintenance Foreman, or Track Maintenance Foreman) **whose position was abolished will have prior rights to return to his former position if such position is re-established within a period of eighteen months**, except that such prior rights will not extend over a senior employee in the same classification who has been displaced and is exercising seniority to displace a junior employee.
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> (emphasis added)

The parties to this dispute are sophisticated in the ways of collective bargaining, and the workings of job security protections within the industry. It would, it seems to me, have been reasonably simple for the parties to provide for the contingency which arises in this grievance, if they intended that employees in the circumstances of the two grievors should be entitled to revert to their original rights at the expiry of the Larson protection period. However, when article 7.8 is examined closely, what it provides is a limitation on the right of the Company to compel an employee to relocate if, at the time of the technological, operational or organizational change the employee can invoke the protection by reason of having been relocated within a period of five years previous to that date. The article does not speak, either expressly or implicitly, to the rights of the employee or commensurate obligations of the Company five years from the time the article is invoked by the employee, or indeed at any time subsequent. Rather, as noted above, the provision is intended as a qualification in respect of the initial obligations which befall the employee at the time of the original article 8 notice which triggers the elections available to employees. Indeed, as the Company's representatives point out, a letter dated August 31, 1988 written by Assistant Vice-President, Industrial Relations D.V. Brazier to then Vice-President of the Brotherhood, Mr. Armand Passaretti, clarified a number of circumstances by way of examples, including the following listed as example no. 4:

> An employee who has employment security was required to relocate on January 1, 1985. The same employee is affected by an article 8 notice on January 1, 1989 and has his job abolished. He is the only employee at this particular location and would be required to relocate except that restriction No. (ii) above does not require him to relocate until January 1, 1990. In the above circumstances, the employee would be required on January 1, 1990 to exercise his displacement rights in accordance with the terms of his collective agreement.

The above example, which appears to have been accepted without protest by the Brotherhood, contemplates that an employee who has been idle on employment security would be compelled to exercise displacement rights upon the expiry of his or her five year period of protection. That is in obvious pursuance of the bargain which underlies the concept of employment security. However, there is, very simply, no similar document of understanding to confirm the very different right now asserted by the grievors.

It should be stressed that the Arbitrator's conclusion does not condemn the grievors to forever hold the lower rated positions to which they elected through the operation of article 7.8. Should higher rated positions become vacant and available to them through the normal bidding procedures of the collective agreement in future, they will of course be able to assert such bidding rights as their seniority will allow, under the terms of the collective agreement. Moreover, while it appears undeniable that a certain anomaly may result, to the extent that junior employees may in fact occupy higher rated positions until such vacancies become available, it has been well recognized by arbitrators that anomalies of that kind are not unknown under the regime of employment security and job security which the parties have fashioned. In **CROA 2889** the following comment appears:

> … as disclosed in many prior cases involving the administration of employment security within the railway industry, the concept of employment security has inevitably given rise to difficult results including, for example, the forcing of senior employment security employees to take positions in other locations, while junior ES employees were able to remain in their home location, to cite but one instance. The problem of worker equity created by ES was well described in the award of June 14, 1995 issued by the Mediation-Arbitration Commission chaired by the Honourable Mr. Justice George W. Adams, in the dispute between CN and the CAW clerical employees where, at pp 56-7, the following appears:

…

> This degree of ES also produces difficulties for recipient workers and their trade unions. For example, it is a benefit difficult to improve upon and impossible to give up. It can, however, produce real dissension within the ranks of workers as more senior employees are required to work and to perform the least desirable tasks, while junior redundant employees have less demands made of them. In fact, the benefit produces such perverse rules as junior employees on ES status having to take available work before their senior counterparts. There is also the problem of junior employees on ES working more desirable shifts than active senior employees and being able to take their annual vacations during the more preferable vacation periods.
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> From the employee's point of view, the benefit may represent a deterrent to undertaking the personal burdens of job search, retraining and relocation. A description that comes to mind is that of "golden handcuffs". While no employee wants to sit at home, the problems associated with relocating or even finding other available work closer to home, particularly for the older worker, can be quite daunting. Once having achieved lifetime employment security, individual employees would likely require their employer to be on the brink of bankruptcy to give it up.

From a purposive point of view, the Arbitrator is also persuaded that the interpretation of the Company is to be preferred. The rather complex set of rights and obligations provided under article 7 of the Job Security Agreement must, I think, be taken as contemplating a degree of certainty and finality in the moves undertaken by employees who make their elections in the face of an article 8 notice. If the Brotherhood's interpretation is adopted, the consequences and outcomes of an article 8 notice would not be known or indeed knowable for a period of up to five years. That would introduce a high degree of uncertainty and unpredictability in respect of the ultimate cost to the employer of an operational or organizational change. While the parties may be at liberty to negotiate such a system, a board of arbitration must require clear and unequivocal language to conclude that it was intended. There is nothing in the language or scheme of the Job Security Agreement, or indeed the collective agreement, to support the view that such an outcome was intended.

Article 7.8 merely provides that an employee cannot be required to relocate if he or she meets the conditions established. It makes no express or implied provision for a further election to displace at a later time. For the reasons expressed, I am satisfied that the granting of so important a right must be evident in clear and unequivocal language.

In the result, the Arbitrator is compelled to conclude that the interpretation of the Company is to be preferred. For these reasons the grievance must be dismissed.

November 25, 1997

(signed) MICHEL G. PICHER
ARBITRATOR