CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3064

Heard in Montreal, Tuesday, 14 September 1999

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

The payment of certain benefits to ES employees who are recalled to temporary, lower rated bargaining unit positions and whether these benefits are to be characterized as maintenance of basic rates (MBR) made pursuant to article 8.8 of the Job Security Agreement (JSA) or as a "top up" that is an ES benefit paid out of the ES Trust Fund.

JOINT STATEMENT OF ISSUE:

The Company takes the position that an employee who: **(1)** is adversely affected by a technological, operational or organizational change, **(2)** ends up on employment security (ES) in accordance with the terms of the JSA, and **(3)** is recalled to a temporary, lower rated position in his/her own bargaining unit, is not entitled to receive an MBR paid pursuant to article 8.8 of the JSA but rather, receives a "top up" that is an ES benefit paid out of the ES Trust Fund. The Brotherhood disagrees. The parties are in agreement that an MBR is not an employment security benefit.

The Brotherhood contends that: **(1)** any benefit paid to an ES employee in the situation described above is an MBR paid pursuant to article 8.8 of the JSA; **(2)** The ES Trust Fund is liable only for the payment of "ES Benefits" as defined by Appendix E of the JSA; and **(3)** The Company's position is in violation of article 8.8 of Appendix E of the JSA.

The Brotherhood requests: **(1)** that it be declared that the situation described above is, as the Brotherhood argues, an MBR situation and that MBR payments are properly made by the Company alone and not a "top up" paid out of the ES Trust Fund. **(2)** That it be ordered that the ES Trust Fund be reimbursed in an amount equal to the total of MBR payments made and charged to the ES Trust Fund.

The Company maintains that MBR payments are properly made by the Company, but certainly not in the situation involving employees placed on ES benefits and subsequently recalled to temporary, lower rated position in their own bargaining unit. Therefore, the Company declines the Union's request.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. KRUK	(SGD.) R. M. ANDREWS
SYSTEM FEDERATION GENERAL CHAIRMAN	DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

R. M. Andrews	– Manager, Labour Relations, Calgary
D. T. Cooke	– Manager, Labour Relations, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
G. D. Housch	– Vice-President, Ottawa
D. W. Brown	– General Counsel, Ottawa
R. Achim	– E.S.F. Plan Administrator, Ottawa

AWARD OF THE ARBITRATOR

It does not appear disputed that in May or June of 1998 the Company changed its practice with respect to the payment of the top up of wages to employees on ES who are temporarily recalled to lower rated active employment. From that time forward it took the monies for such payments from the Employment Security SUB Trust Fund which is established under article 4 of the Job Security Agreement, rather than from its own general funds. The Brotherhood takes the position that it is improper for the company to utilize the ES SUB Trust Fund in that fashion, and maintains that the wages of employees who return from ES to occupy lower paid temporary positions are to be topped up in accordance with the maintenance of basic rates (MBR) provisions of article 8.8 of the Job Security Agreement (JSA). The narrow issue to be determined, therefore, is whether the wage top up of an employee on ES status who returns to active employment in a lower rated job is to be paid out of the SUB Trust Fund or is to be administered as a cost chargeable to the Company as part of the MBR provisions of article 8.8 of the JSA, as the Brotherhood asserts.

A brief chronological outline of these provisions is useful. The concept of the MBR has existed within the parties' Job Security Agreement for many years, and pre-dates the provisions of the collective agreement relating to employment security. Article 8.8 of the JSA, which governs maintenance of basic rates, provides as follows:

> **Maintenance of Basic Rates**
> **8.8** An employee whose rate of pay is reduced by $2.00 or more per week, by reason of being displaced due to a technological, operational or organizational change, will continue to be paid at the basic weekly or hourly rate applicable to the position permanently held at the time of the change providing that, in the exercise of seniority, he …

The provision goes on to provide certain conditions whereby the employee must accept the highest rated available position, initially at his location, and thereafter on his basic seniority territory to maintain entitlement to MBR protection. The MBR is a three year protection which is thereafter red circled until general wage increases applied on the lesser paid position overtake the incumbency differential.

Employment security is a different concept, flowing primarily from the provisions of article 7 of the Job Security Agreement which provides, in part, as follows:

> **7.1** Except as provided in article 7A, subject to the provisions of this article and in the application of article 8.1 of this agreement, an employee will have employment security (ES) when he has completed 8 years of cumulative compensated service (CCS) with the Company. An employee on laid-off status on July 9, 1985 will not be entitled to ES under the provisions of this agreement until recalled to service.
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> **7.2 (a)** An employee who has ES under the provisions of this article who is subjected to lay-off or continuing lay-off as the result of a change introduced through the application of article 8.1 of the Job Security Agreement shall be eligible for ES payments from the Employment Security Fund (ESF) established pursuant to Appendix "E".
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> **(b)** ES payments shall be 90%, unless subsequently modified, of the employee's basic rate of pay, minus all regular deductions including union dues, paid out of the ESF. If an employee is eligible for unemployment insurance (UI), the UI shall be topped up to represent 90%, unless subsequently modified, of the employee's basic rate of pay from the ESF, subject to SUB registration with Human Resources Development Canada. All benefits while an employee is on ES shall be maintained, paid out of the ESF, as if the employee were actively employed by the Company.

Article 7 then goes on to provide obligations relating to the mandatory exercise of seniority rights, and the filling of positions up to and including work outside the bargaining unit and outside the Company, as a condition of continuing to maintain employment security protection.

In 1995 the parties negotiated changes to the employment security system particular to their own collective agreement. Most significantly they established two separate ES funds. The first is the ES SUB Trust Fund which is defined as follows in article 1 of Appendix E of the Job Security Agreement, as finally negotiated in November of 1998:

> **1.3 (k)** "ES SUB Trust Fund" means the trust fund established for the purposes of the ES SUB Plan and which is hereinafter administered in accordance with the terms of this ES SUB Plan Agreement and the ES SUB Trust Agreement.

The second is the ES EB Trust Fund, which relates to employee non-wage benefits as more specifically described in sub-paragraph (f) of article 1.3 of Appendix E:

> **1.3 (f)** "ES Employee Benefits" means all benefits or benefit plan costs (other than ES SUB benefits) payable to or on behalf of ES eligible employees pursuant to the collective agreement, including without limitation, vacation, extended health and vision, dental, life insurance, weekly indemnity, bereavement leave, general holidays and jury duty benefits and all employer contributions to pension plans on behalf of ES eligible employees. ES employee benefits do not include any benefits which are payable or which accrue to an ES eligible employee during any period while such employee is actively working for the Employer.

The unchallenged representations of the Brotherhood establish that as a condition of having the ES SUB Trust Fund registered as a supplementary unemployment benefits plan as defined in the **Income Tax Act (Canada)** and the **Employment Insurance Act (Canada)** the funds of the ES SUB Trust can only be dispersed for the purposes of assisting employees who are laid off. They cannot be paid to employees who are actively at work, either in a permanent or temporary position. That, the Brotherhood submits, is reflected in article 9.2(c) of Appendix E of the JSA which provides as follows:

> **9.2** Notwithstanding the foregoing:
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> …
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> **(c)** No ES SUB Benefits are payable under the ES SUB Plan or from the assets of the ES SUB Trust Fund for the purpose of maintaining, in whole or in part, the former level of remuneration of an ES eligible employee who has, for technological, operational or organizational reasons, been transferred to new employment at a lower level of remuneration.

Taken as a whole, the provisions negotiated in 1998 appear to the Arbitrator to be more consistent with the position taken by the Brotherhood in this grievance than that espoused by the Company. The Company's position is understandable, and flows from its view of the traditional operation of employment security benefits. According to its representations for many years employment security benefits have been utilized to top up the wages of employees who have ES and are returned to work on temporary assignments at positions which are lower rated than those of their originally held jobs. The Company maintains that prior to the establishment of the self-administered ES fund originally in 1995, and as amended in 1998, the Company consistently treated employees in that circumstance not as entitled to an MBR, but as entitled to continuation of their full wages in accordance with the fundamental principle that as ES protected individuals they could not be laid off or reduced in their wages. The Brotherhood questions whether in fact the records would support the Company's view, suggesting that in fact many employees who were subject to job abolishments by technological, operational or organizational change, who were placed on ES and subsequently returned to lower paid assignments were in fact treated as being on MBR protection, with the reductions of red circling after three years. It is not necessary, for the purposes of this grievance, to resolve any factual dispute which may be outstanding in that regard.

It is also clear that the parties emerged from their negotiations of Appendix E in November of 1998 with what the Company has described an "agreement to disagree" on the very issue which is the subject of this grievance. It appears undisputed that they concluded their agreement on the understanding that the Company viewed wage top up payments as payable from the ES SUB Trust Fund while the Brotherhood held the contrary view that MBR protection was to be accorded to employees who returned to lower paid work from ES status.

I am satisfied that there is nothing in the material before me that would suggest bad faith or sharp practice on the part of the Company, as alleged, in part, by the Brotherhood. The position of the Company, which stems from an orthodox understanding of the concept of ES, is understandable and legitimately arguable. The Arbitrator does not, however, have jurisdiction to choose as between competing theories. Trite as it is to say, I must interpret the provisions of the Job Security Agreement as I find them. It may be noted in passing that the conceptual dispute which underlies this grievance could not have arisen prior to 1995, when payments to employees, whether MBR or ES, all flowed from the employer. The fact that MBR funds flow from the Company and ES funds flow from the finite pool of the ES SUB Trust Fund jointly administered by the parties is at the root of the dispute before me.

When the language of Appendix E is examined closely, I am compelled to accept the position of the Brotherhood as more persuasive. When asked to characterize the meaning of article 9.2(c), which clearly prohibits, apparently in keeping with federal law, the use of any part of the ES SUB Trust Fund for topping up the wages of the actively employed, the Company's representative whose submissions are candid and helpful, describes the provision as "mystifying". With respect, in my view, it would be more accurate to say that the provisions of article 9.2(c) of Appendix E of the JSA are clearly inconsistent with the fundamental theory which underlies the position of the Company. The Arbitrator finds it difficult to accept that, on the one hand the parties fashioned a job security agreement whereby employees with ES protection are to receive top up payments from the dedicated ES SUB Trust Fund when they hold lower rated positions while on the other expressly acknowledging, apparently in conformity with federal law, that the SUB Trust Fund cannot be utilized for that very purpose. Article 8.3 of Appendix E further supports the Brotherhood's interpretation. It reads as follows:

> **8.3** Employees have no vested rights to payments or benefits under the ES SUB Plan, except to payments during the period of unemployment as provided for under the ES SUB Plan

It is well established that, to the fullest extent possible, a board of arbitration must strive to interpret the provisions of a collective agreement, including a job security agreement, in a manner which renders them consistent and complementary, rather than contradictory. In that regard, the Brotherhood's submission is more compelling.

The question which then emerges is whether article 8.8 of the JSA can, as the Brotherhood submits, apply so as to allow for the top up of employee wages in the circumstance of an employee on ES who returns to work in a lower rated position after he or she is placed on ES status. I can see no reason why article 8.8 should not be interpreted to apply in such a circumstance. By its own terms, the article exists as a protection for employees in the event of a technological, operational or organizational change which adversely impacts the individual. An employee who is "displaced" due to such a change is entitled to MBR protection as provided under article 8.8, subject of course to the conditions contained therein. That also describes the circumstance of employees who are displaced onto ES by reason of a technological, operational or organizational change. There is nothing in the logic of article 8, which is itself part of the Job Security Agreement which also came to provide for employment security, to suggest that it was not intended to operate in the circumstances disclosed.

If the position of the Company were to obtain, so that article 8.8 and MBR protection had no application, article 9.2(c) of Appendix E would foreclose the payment of top up monies to employees from the ES fund, with the net result that employees returning from inactivity on ES status to a lower rated position would have no wage protection whatsoever. Such a consequence would be unprecedented in the operation of the Job Security Agreement, and in the Arbitrator's view would be clearly inconsistent with the overarching intention of the entire document, as it has been administered over many years. To put the matter simply, I am satisfied that if the parties had intended that an employee returning to work into a lower rated position from ES status was to have no wage protection, in a manner contrary to all prior practice and agreements, they would have provided clear and unequivocal language to indicate such a result. No such language is to be found either within Appendix E or the Job Security Agreement generally. On balance I am compelled to conclude that the agreement, taken as a whole, must be interpreted to mean that employees returning from ES status to occupy positions which are lower rated than their originally held jobs are entitled to the MBR protections contemplated in article 8.8 of the Job Security Agreement.

The grievance is therefore allowed. The Arbitrator finds and declares that the Brotherhood's position is correct. The Company is directed to reimburse the ES SUB Trust Fund in the total amount of MBR payments which should have been paid in accordance with the conclusion of this award, namely the erroneous ES top up payments. It would appear undisputed that the Company is likewise entitled to treat what it previously viewed as ES top up payments as MBR payments for all purposes, including their duration, red circling and the conditions which attach to their maintenance. Should the parties be disagreed as to any aspect of the interpretation or implementation of this Award the matter may be further spoken to.

September 21, 1999

(signed) MICHEL G. PICHER
ARBITRATOR