CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3161

Heard in Calgary, Tuesday, November 14, 2000

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

Payment of incumbency to G.B. Côté pursuant to the agreement reached June 19, 1996 regarding the implementation of extended runs between Smithers and Prince Rupert, British Columbia.

JOINT STATEMENT OF ISSUE:

G.B. Côté was working in Terrace, British Columbia at the time of the implementation of extended runs trains between Smithers and Prince Rupert. Mr. Côté was adversely affected by this implementation and properly entitled to an incumbency pursuant to the agreement of June 19, 1996 reached between the parties to minimize the adverse effects of the implementation.

Mr. Côté relocated to Kamloops, British Columbia through a proper exercise of seniority in November of 1997. Mr. Côté's incumbency payments ceased shortly after relocating and the Company refuses to pay any further incumbency to him.

The Union submits that Mr. Côté is entitled to receive incumbency payments in accordance with the agreement of June 19, 1996.

The Company disagrees.

FOR THE COUNCIL:

(SGD.) R. A. HACKL
FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) R. RENY
FOR: VICE-PRESIDENT, LABOUR RELATIONS

Appearing on behalf of the Company:

R. Reny	– Human Resources Associate, Vancouver
S. Michaud	– Business Partner, Human Resources, Vancouver
D. C. Mcdonnell	– Legal Counsel, Montreal
P. Parker	– System Manager – Pay Systems, Edmonton
S. Ziemer	– Human Resources Associate, Vancouver
J. Hnatiuk	– Manager, Labour Relations, Edmonton
S. Blackmore	– Human Resources Associate, Edmonton

Appearing on behalf of the Council:

M. A. Church	– Counsel, Toronto
R. Hackl	– Vice-General Chairperson, Saskatoon
B. R. Boechler	– Vice-General Chairperson, Edmonton
G. Kopp	– Local Chairperson, Kamloops
J. W. Armstrong	– Vice-President, UTU, Ottawa

W. Franko – Local Chair, Edmonton

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. It is common ground that upon the implementation of extended runs between Smithers and Prince Rupert, in accordance with the terms of a Special Agreement negotiated between the parties, Conductor G.B. Côté was awarded maintenance of earnings protection, and bid on the highest position which his seniority could attain at Terrace. He continued to work in that capacity for some fourteen months, until the collapse of the Kitimat bridge resulted in an outage of service which caused the abolishment of the position which he then held. While it is not disputed that he might have bid on other positions at Terrace at the time, Mr. Côté then opted to bid to Kamloops. It appears that following an initial week of training and familiarization, he occupied a furlough board position at Kamloops for a time and has protected work at Kamloops, both as a conductor and assistant conductor, as well as in his capacity as a qualified locomotive engineer.

The instant dispute arises because the Company terminated Mr. Côté's maintenance of earnings payments upon his move to Kamloops. The Company maintains that because the grievor voluntarily relocated, as was his right under article 39.19 of collective agreement 4.3, he fell outside the scope of the extended run agreement, and therefore forfeited his maintenance of earnings protection.

Counsel for the Council submits that the position of the Company is unprecedented, and contrary to all understandings in relation to maintenance of earnings protection in special agreements negotiated between the parties over a substantial number of years. He argues that it violates the specific language of the extended run agreement of June 19, 1996 concerning the implementation of extended runs between Smithers and Prince Rupert.

In support of the Council's position, counsel points to the testimony offered by UTU Vice-President John Armstrong, who was directly involved in the negotiation of the Special Agreement, and its explanation to the employees affected, in conjunction with Company representatives, in his capacity as then General Chairperson. Mr. Armstrong also has extensive experience in the negotiation and administration of other special agreements containing maintenance of earnings provisions.

The thrust of Mr. Armstrong's evidence is that for many years special agreements negotiated between the Company and the Council, across Canada, have generally operated on the understanding that an individual's maintenance of earnings protection does not cease when he or she moves from the terminal at which the employee's protection originated, to protect service at another location in accordance with the exercise of seniority rights under the collective agreement. That remains so as long as the employee honours the conditions contained within the special agreement for the continuation of the maintenance of earnings protections. In answer to a question from the chair, Mr. Armstrong responded that he is not aware of any special agreement of this kind which, by its own terms, is conditioned upon continued employment at the original home terminal where the incumbency first arose.

In support of its own position the Company points to other special agreements which expressly provide for the transfer of incumbency protections for employees who voluntarily transfer out of their home terminal by the exercise of their seniority, pursuant to the terms of the collective agreement. Reference is made, for example, to the terms of Appendix E of the memorandum of agreement between the parties concerning changes affecting the home stations of Hanna and Mirror, Alberta.

The Company's representatives also draw to the Arbitrator's attention provisions in the instant Special Agreement which limit relocation allowances for employees required to relocate to maintain employment. In that regard paragraph 1(B)(ii) provides, in part, as follows:

> **1(B)(ii)** Employees relocating under this option (B) will not be permitted to occupy the furlough board for a period of one year unless unable to hold work at their new terminal.

To a somewhat similar effect the Arbitrator is directed to the provisions of the memorandum of agreement concerning a number of Northern Saskatchewan locations, including Prince Albert, apparently executed on October 23, 1997. That agreement also provides that relocation benefits are payable only to employees transferring to a terminal that does not have a surplus of employees.

As a point of first principle, the Arbitrator is bound by the language of the Special Agreement which is the subject of this dispute. Paragraph 2 of that agreement deals with the establishing and continuation of maintenance of

earnings incumbencies. The conditions for first establishing maintenance of earnings protection are described, in part, in paragraph 2(a)(i) of the special agreement, which provides as follows:

> **2.** Employees who are displaced from their classification as a direct result of this change shall be entitled to a maintenance of basic rate in accordance with the following:
>
> **a)** The basic weekly pay of employees 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:
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> **(i)** 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 correspondingly. In the event of disputes as to the position with the highest earnings to which they must exercise seniority, the Company will so identify;
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> (emphasis added)

The duration of incumbency rights is treated separately in sub-paragraph 2(c) in the following terms:

> **(c)** The payment of an incumbency, calculated as above, will continue to be made:
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> **(i)** as long as the employee's earnings in a four-week period is less than four times his or her basic weekly pay;
>
> **(ii)** until the employee fails to exercise seniority to a position, including a known temporary vacancy 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**: An employee who fails to exercise 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 vacancy, his or her incumbency will be reduced only for the duration of that temporary vacancy.
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> **(iii)** until the employee's services are terminated by discharge, resignation, death or retirement.
>
> (emphasis added)

As appears from the material filed at the hearing, the language of the above provisions is to be found in other special agreements which provide for maintenance of earnings including, for example, the Prince Albert agreement referenced above, as well as a special agreement negotiated in relation to the transfer of the Okanagan and Lumby subdivisions, dated December 16, 1999, and agreements in relation to the sale of lands from Smith to Hay River, dated March 31, 1998 and the abolishment of helpers' positions in the Walker Hump Yard, an agreement dated November 15, 1999.

The Arbitrator has some difficulty giving precedential weight to some of the agreements cited above, to the extent that they were negotiated after the Special Agreement which is the subject of this dispute. In my view, however, the agreements placed before me are, to some degree, reflective of the general understanding which has operated in relation to material change agreements of various kinds negotiated within the industry for a great number of years. Unlike the bargaining units of non-operating employees, and it would also appear locomotive engineers, the employees in the instant bargaining unit have not had master language incorporated into their own collective agreement with respect to maintenance of earnings provisions in the event of a material change. Those arrangements are individually negotiated on a case by case basis. However, the Arbitrator has no reason to reject the evidence of Mr. Armstrong, which is unrebutted by any testimony from the Company, that he is aware of no special agreement which specifically restricts maintenance of earnings protections to continued employment in a given location.

It is clear from the evidence before me, as reflected in some of the other agreements tabled, that changing economics and operational realities have influenced the content of special agreements, reflecting the natural desire of the parties to tailor agreements to protect their interests in a given circumstance. For example, it is not surprising

to see provisions which withhold relocation benefits from employees who might seek to move to locations where the complement of employees is in a surplus position. Conversely, special agreements can sometimes contain cash incentives to prompt employees to transfer to locations which have manpower shortages, as evidenced in certain of the other agreements tabled before me.

Can it be said, as the Company argues, that specific reference to the portability of maintenance of earnings protections, as contained in certain of the agreements examined, is proof that the parties only make such a provision by express reference? I think not. Provisions such as maintenance of earnings, relocation allowances, severance payments and early retirement arrangements within special agreements are negotiated against a well-established tradition within the industry, in a context of mutual expectations which has a considerable history. On the evidence before me, which is essentially unrebutted as given by Mr. Armstrong, I am satisfied that within the industry, and between the instant parties, the presumption is that maintenance of earnings protections are portable to other locations, unless otherwise indicated within the language of the special agreement under consideration.

In my view that presumption is consistent with the language of the Special Agreement here in dispute. It is, I think, significant that the language of paragraph 2 of the agreement deals separately with the establishing of maintenance of earnings rights on the one hand, and the conditions for their continuation, on the other hand. Sub-paragraph 2(a)(i) speaks specifically to the requirement that an employee "… first accept the position with the highest earnings **at their home terminal** to which their seniority and qualifications entitle them." as a condition for first obtaining maintenance of earnings entitlement.

Significantly, the separate provision which deals with the continuation of maintenance of earnings rights does not expressly tie that continuation to service within the original home terminal. Sub-paragraph 2(c)(ii) makes separate reference to the ongoing obligation of an employee to bid the position with the highest earnings for which senior and qualified "… **at the station where he or she is employed**;". If the parties had intended the continuation rights to be tied to service at the original home terminal, they could easily have said so. In a manner consistent with years of practice in the industry, they did not.

In the Arbitrator's view the adopted difference in wording as between articles 2(a)(i) and 2(c)(ii) is consistent with two realities. The first is that, traditionally, maintenance of earnings protections have been portable from one location to another, as a matter of common practice for years in the special agreements between these parties. Secondly, the difference in wording is consistent with a recognition that the collective agreement right of an employee to bid to another location by the exercise of seniority under article 39.19 of the collective agreement is intended to co-exist with an individual's incumbency, and not undermine it. That is also consistent with the conditions of sub-paragraph (iii) which contemplate the continuation of an employee's incumbency until discharge, resignation, death or retirement. Additionally, it is not insignificant that the Special Agreement expressly contemplates, by its relocation provisions, that employees who are covered by its benefits may be compelled to relocate as a direct result of the material change.

Nor is the Arbitrator persuaded by reference to provisions in other agreements which expressly contemplate the continuation of maintenance of earnings protections for employees who voluntarily exercise their seniority beyond their home terminal, as for example in the Hanna and Mirror agreement. In a case such as that, where the agreement is struck precisely because the home terminal is closed, such language may simply be inserted in recognition of the fact that the initial condition for establishing an incumbency at the home terminal might not be possible. In other circumstances, involving changes of broad application such as the belt pack agreement, they may be responsive to a similar reality, or simply be intended to be informative. In the instant Special Agreement, while the parties placed certain limitations on relocation payments, tied to conditions at the other locations, they inserted no such qualification with respect to the duration of an employee's incumbency.

In the result, having regard to all of the material presented, and to the submissions of the parties, the Arbitrator finds the position of the Council to be the more compelling, both in respect of the history of maintenance of earnings provisions and, most significantly, the interpretation and application of specific language of the Special Agreement relating to extended runs between Smithers and Prince Rupert, which is the subject of this dispute. For these reasons the grievance must be allowed. The Arbitrator directs that the grievor be fully compensated for all maintenance of earnings payments to which he would have been entitled following his transfer to Kamloops. Should the parties be disagreed as to the quantum the matter may be spoken to.

November 20, 2000

(signed) MICHEL G. PICHER
ARBITRATOR