CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3199

Heard in Montreal, Wednesday, June 13, 2001

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

The issue giving rise to this dispute involves the Company's application and interpretation of Article 9A. clause 6 and related provisions of the collective agreement.

EX PARTE STATEMENT OF ISSUE:

On or about November 16, 1998 several trainpersons/yard persons received a letter stating that their maintenance of basic rate (MBR) would be terminated as of October 25, 1998.

Conductor Only persons had been implemented in Hamilton on October 25, 1992. It is the Union's position that employees who were displaced from trainpersons positions upon implementation of Conductor Only should continue their entitlement to an incumbency pursuant to Article 9A, Clause 6.

Additionally, a Step 2 grievance concerning this issue was advanced to the attention of Manager Road Operations Mr. Fletcher on May 7, 1999. No response was forthcoming. Accordingly, the Union relies upon Article 39, clause (d) and requests the claim should be allowed as presented.

The Union request incumbencies be re-issued to all employees who were similarly affected when Conductor Only was implemented. Furthermore, all employees deprived of incumbencies under similar circumstances be reimbursed retroactively for all time so deprived.

The Company has declined the Union's request.

FOR THE COUNCIL:

(SGD.) D. A. WARREN
GENERAL CHAIRPERSON

There appeared on behalf of the Company:
S. Seeney – Manager, Labour Relations, Calgary

And on behalf of the Council:
D. A. Warren – General Chairperson, Toronto

AWARD OF THE ARBITRATOR

While the Company raises a preliminary objection with respect to the arbitrability of the grievance, given the disposition of the matter on its merits the Arbitrator finds it unnecessary to deal with the issue of *res judicata* raised by the employer. Secondly, a procedural issue is raised by the Council. It submits that the instant case concerns wage claims made by some five employees employed at the Hamilton terminal. Its representative argues that as the Company did not provide a timely reply to the grievance the claims should automatically be paid, by the operation of article 39(d) of the collective agreement.

Article 39(d) reads, in part, as follows:

> **39 (d)** … Where a decision on a grievance concerning the meaning or alleged violation of any one or more of the provisions of the collective agreement and in which a wage claim is involved, is not rendered by the appropriate officer of the Company with the prescribed time limits, the claim shall be allowed as presented but this shall not be considered as a precedent or waiver of the contention of the Company as to similar claims. …

In the instant case the Arbitrator cannot accept the suggestion of the Council's representative that what is at stake is a discrete "wage claim" as contemplated within the language of the foregoing provision. At issue in these proceedings is a much larger dispute. It concerns the alleged entitlement of employees to claim maintenance of basic rates (MBR) protections, dating back to 1992, based on work then performed in the classification of brakeperson, the effect of which is to provide a lifelong maintenance of basic rates protection to all employees who have protected status under the conductor-only provisions of the collective agreement. It is, in essence, considerably more than a wage claim or a group grievance, and is in fact properly characterized in the Council's own partial description of it as being a "policy grievance". I am satisfied that the larger scope and ramifications of the dispute between the parties take it outside the purview of article 39(d) of the collective agreement, which is primarily intended to deal with a failure of response to individual claims for fixed sums of wages which are allegedly unpaid for work performed. The instant case raises the employment status of protected employees and their alleged general entitlement to a form of ongoing insurance benefit by way of maintenance of earnings protection. On that basis the Arbitrator cannot sustain the argument of the Council to the effect that the grievances should be automatically allowed by the operation of article 39(d) of the collective agreement.

With respect to the merits of the grievance, the Arbitrator has substantial difficulty with the position advanced by the representative of the Council. As previously determined by this Office in **CROA 2475**, and reconfirmed in **CROA 2961**, it is clear that the Company is at liberty to blank non-required positions when it bulletins available assignments at the twice yearly change of card. In that circumstance it must, however, allow protected employees who cannot hold a required position to occupy an available non-required position. The thrust of the decisions in **CROA 2475** and **2961** was to reject the suggestion of the Council that protected employees could "flow through" the non-required positions for the purpose of establishing an MBR entitlement to apply in augmentation of their wages in the required position which they would in fact occupy. Upon a review of the history of the matter, the practice between the parties in respect of the Conductor-Only Agreement, and the language of the collective agreement, I am satisfied that the primary intention of the parties was to provide to protected employees the ability to revert to occupying a non-required position should they be unable to hold a required position.

The argument advanced by the Council's representative essentially likens the MBR protection afforded to employees under the Conductor-Only Agreement to a lifetime MBR of the type found in some material change agreements, the VIA Special Agreement being cited as an example. In the Arbitrator's view that interpretation is not borne out by the material before me.

Firstly, with respect to practice, it does not appear disputed that in the majority of locations, following the 1992 implementation of conductor-only operations, the Company followed the practice, without apparent objection by the Council, of treating a conductor-only MBR as being available to an employee who is forced from a non-required into a required position during the period between changes of card. As a general rule the Company did not award an employee who successfully bid onto a required position an MBR based on the earnings of the employee prior to the original implementation of the Conductor-Only Agreement. It does appear that at a small number of locations in the west, for a time, the Company did apply the agreement otherwise, and that similarly until the change giving rise to this grievance, employees in the Hamilton terminal were given maintenance of basic rates protection while occupying required positions, based on their earnings prior to the implementation of the Conductor-Only Agreement

in 1992. In the submission of the Company's representative, this case, as well as the cases previously cited, involve a correction in the somewhat disparate practices found in a minority of locations, and an eventual correction so as to ensure a consistent and correct practice in the application of the conductor-only provisions of the collective agreement.

Apart from the fact that the preponderant practice across the country would appear to support the approach taken by the employer, the language of the collective agreement is, in my view, more consistent with the Company's interpretation. Article 9A 3 deals with the fundamental conditions under which the employer may operate on a conductor-only basis, and the related entitlements of protected and non-protected employees. It provides, in part, as follows:

> **9A – CONDUCTOR-ONLY OPERATION IN FREIGHT SERVICE**
>
> **3.** On subdivisions on which the Company has notified the Union that conductor-only operations will be implemented, trains will be operated with a conductor-only train crew at any time thereafter in accordance with the following:
>
> **a)** Employees with a seniority date on or before June 18, 1990 will be entitled to fill a non-required first Brakeperson's position.
>
> Only Employees with a seniority date on or before March 7, 1979 will be entitled to fill a non-required second Brakeperson's position subject to the provisions of Article 9.
>
> **b)** All positions, whether required or non-required, will be advertised at the general advertisement of assignments; upon the setting up of new assignments; and/or upon the creation of a permanent vacancy in assigned road or yard service. Only those required positions will be filled unless circumstances are such that the other provisions of this Clause 3 pertaining to the placement of protected employees in non-required positions can be applied.
>
> Required positions will be awarded to the senior protected employee applying therefore.
>
> **c)** Required position(s) for which no applications are received from protected employees at the terminal or outpost thereto will be filled in the following order;
>
> > **i)** The junior protected employee(s) with a seniority date subsequent to March 7, 1979 not holding required positions at the terminal or outpost location thereto.
> >
> > **ii)** Protected pre-March 7, 1979 employees not holding required positions at that terminal or outpost thereto.
> >
> > **Note:** A protected employee with a seniority date on or before March 7, 1979 cannot be forced to any position outside of the home terminal or outpost thereto where they are employed. If employed at an outpost terminal, they cannot be forced back to the main home terminal, which provides relief to that terminal.
> >
> > A protected employee may be forced from a non-required position to a required position, whether vacant or filled by an unprotected employee. In such circumstances the protected employee, provided he occupies the required position to which forced, will be entitled to a Conductor-Only Maintenance of Basic Rate pursuant to the terms and conditions of this article.
> >
> > **iii)** Protected employees with a seniority date subsequent to March 7, 1979, not holding required positions may be assigned to fill any required position at a main home terminal adjacent thereto in any direction on the District Seniority Territory not filled by a protected employee.
> >
> > **iv)** Notwithstanding the application of (i), (ii) and (iii) above, if a permanent required position remains unfilled, it will be filled by the senior unprotected employee not holding a required position in the sub-zone in which the permanent position exists.
> >
> > **v)** If there is no unprotected employee available in that sub-zone, the position will be filled by the senior unprotected employee not holding a required position in the zone.

vi) If there is no unprotected employee available in the zone, the position will be filled by the senior unprotected employee not holding a position on the superintendent's division as they existed in 1992.

vii) If there is no unprotected employee available in the superintendent's division as they existed in 1992, the position will be filled by the senior unprotected employee not holding a required position on the seniority district.

d) Between the General Advertisement of Assignments, protected employees awarded required positions pursuant to clause (c), or an employee who bids and is awarded a required position and as a result the number of non-required positions is reduced, will be entitled to a conductor-only MBR.

As appears evident from the foregoing, the parties expressly contemplated that a conductor-only MBR is to be available to protected employees who are forced to required positions under the conditions of clause (c) or who bid and obtain a required position, thereby reducing the number of non-required positions.

Sub-paragraph (i) of article 9A 3(i) also speaks to MBR entitlement, and provides:

9A 3 (i) Employees awarded a non-required position are not entitled to collect a Conductor-Only MBR. However, an employee awarded to a non-required position will continue benefit entitlement to any other MBR/incumbency pursuant to the agreements under which they are provided.

The foregoing quoted articles are obviously specific with respect to the circumstances in which a maintenance of basic rates entitlement is to be paid under the conductor-only provisions of the collective agreement.

The general provision governing maintenance of basic rates is found in article 9A 6, which reads as follows:

9A 6 MAINTENANCE OF BASIC RATES

A protected employee who holds a non-required position, who, as a result of the conductor-only operation, is required to fill a required position will be entitled to maintenance of earning as follows:

1) The basic weekly pay of such an employee shall be maintained by payment to such employee of the difference between his actual earnings in a four week period an four times his 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 basic weekly pay, no incumbency shall be payable. An incumbency for the purpose of maintaining a employee's earnings shall be payable provided:

a) he is available for service during the entire four week period. If not available for service during the entire four week period, his incumbency for that period will be reduced by the amount of the earnings he would otherwise have earned;

b) in the application of paragraph (a) above, an employee will be considered as having made himself unavailable for service if he books in excess of 10 hours rest at his home terminal or, if in assigned service is unavailable on an assigned working day; and

c) 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.

2) In the calculation of an employee's incumbency, the basic weekly pay shall be increased by the amounts of any applicable general wage adjustments.

3) The payment of an incumbency, calculated as above, will continue to be made so long as the employee is required to fill the required position and:

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

(ii) until the employee fails to exercise his seniority to a required position, including a known temporary vacancy of ninety days or more on a required position, with higher earnings than the

earnings of the position which he is holding and for which he is senior and qualified at the location where he is employed; or

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

In the application of sub-paragraph 3(ii) above, an employee who fails to exercise seniority to a position with higher earnings, for which he is senior and qualified, will be considered as occupying such position and his incumbency will be reduced correspondingly, In the case of a known temporary vacancy of ninety days or more, his incumbency will be reduced only for the duration of that temporary vacancy.

4) A one time calculation, effective August 18, 1997 and in accordance with provisions of Clause 7, 5) following, will be made for all protected employees to establish their Basic Weekly Pay (BWP) for the purposes of this Article, except bridging. Once established it will not be recalculated except to be increased by the amounts of any applicable general wage adjustment.

As is evident from the foregoing, and reflected in sub-paragraph (4), the parties appear to have agreed upon the value of establishing an employee's basic weekly pay on a one-time only basis. The advantage of doing so is, it would appear, consistent with the Company's interpretation of the collective agreement, as it might otherwise become necessary to calculate an employee's basic weekly pay, and resulting incumbencies, every time the individual becomes entitled to maintenance of basic rates protection between two changes of card. If, as the Council maintains, the parties' intention was to establish the entitlement to MBR protection on the basis of employees' earnings prior to the implementation of the conductor-only provisions, as far back as 1992, it is not clear on what basis the provisions of sub-paragraph (4) would be necessary.

Most fundamentally, when the provisions of article 9A 3 and 9A 6 are read together, the more compelling view would appear to be that the interpretation advanced by the Company is correct. The Arbitrator has some difficulty understanding on what basis it would be necessary for the parties to have inserted article 9A 3 (d) into their agreement if, as the Council contends, MBR protection would be available to any employee who might have earned more in a non-required position in the past, if he or she in fact holds a required position. The stipulation expressed in sub-paragraph (d) is substantially different, and limits the awarding of a conductor-only MBR to those situations where an employee either bidding to a required position or being forced onto one pursuant to clause (c) causes a reduction in the number of non-required positions. The article would have no utility if the overall bargain was to assure the more general entitlement to MBR protection which the Council argues was intended for all protected employees, based merely on their previous earnings in non-protected positions. Nor is the Arbitrator persuaded by the argument of the Council's representative to the effect that reference in article 9A 6 to adjustments in basic weekly pay on the basis of periodic general wage adjustments necessarily supports the view advanced by the Council. Such adjustments would obviously be necessary for any MBR calculation, whether under the Council's interpretation or the Company's, particularly where the parties have stipulated the utility of establishing a one-time formula for determining an individual's basic weekly pay, as under article 9A 6(4).

On a full review of all of the elements examined, the Arbitrator is satisfied that the parties did not intend that incumbencies would be established on the basis argued by the Council. Its position in that regard is not sustained by the language of the collective agreement nor, as noted above, can it be said to be consistent with the predominant practice of the Company since the inception of the conductor-only operations in 1992.

For all of the foregoing reasons the grievance must be dismissed.

June 19, 2001

(SIGNED) MICHEL G. PICHER
ARBITRATOR