CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3244

Heard in Montreal, Wednesday, 13 March 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Application of article 8.8 of the Job Security Agreement.

JOINT STATEMENT OF ISSUE:

On January 3, 2002 the Brotherhood and Company officials participated in a conference call during which the Company notified the Brotherhood of impending job cuts. On January 8, 2002 the parties entered into an agreement describing the rights, benefits and obligations of employees affected by the 10 day lay-off notices when it is known by the Company at the time of the serving of the notices that the reductions in question are permanent. The January 8, 2002 agreement provides that all such employees "will be considered as having attained ES status, and would have all the rights and obligations identical to those that would be in effect for ES status employees". However, this agreement states that the parties do not agree on the application of the MBR provisions. In this regard, the Company takes the position that the present grievors (i.e., the individuals affected by the recent job cuts) are not entitled to maintenance of basic rates (MBR). The Brotherhood disagrees.

The Union contends that: **(1.)** The Company's position is illogical. There is no logical reason why these employees should be denied this single benefit when it is acknowledged that they are entitled to every other benefit found in the JSA; **(2.)** The Company's position is in violation of article 8.8 of the JSA when read together with the January 8, 2002 Letter of Agreement and Item 3 of the Agreement on Internal Wage Equity.

The Company contends that: **(1.)** It was never its intent to provide MBRs when negotiating Item 3 of the Agreement on Internal Wage Equity. MBRs have never been paid in non-TO&O reductions. **(2.)** The language of Item 3 of the Agreement on Internal Wage Equity supports the Company's position and this language does not modify the provisions of article 8.8 of the JSA.

The Union contends that the grievors should be recognized as being fully entitled to receive MBRs (if they otherwise satisfy the conditions set out in article 8.8 of the JSA) and that they be compensated for any and all financial losses incurred as a result of the Company's interpretation and application of article 8.8 of the JSA.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. KRUK	(SGD.) E. J. MacISAAC
SYSTEM FEDERATION GENERAL CHAIRMAN	MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

E. J. MacIsaac – Manager, Labour Relations, Calgary
S. Samosinski – Director, Labour Relations, Calgary

And on behalf of the Brotherhood:

J. J. Kruk	– System Federation General Chairman, Ottawa
G. D. Housch	– Vice-President, Ottawa
K. Deptuck	– Vice-President, Ottawa
R. F. Liberty	– System Federation General Chairman, Western System Federation, Winnipeg
L. Gladish	– Secretary-Treasurer, Western System Federation, Winnipeg

AWARD OF THE ARBITRATOR

The record before the Arbitrator establishes that on November 30, 2000 the parties executed a document entitled "Agreement on Internal Wage Equity". That document included the following provision, in part:

> **3)** An employee who occupies a permanent position and who has Employment Security, as defined in Article 7.1 & 7.A.1 of the Job Security Agreement, may elect options 1, 2, 3 or 4 of article 7.14 (JSA), if eligible, or employment security payments paid from the Employment Security Fund, when the Company abolishes his/her position for a period of more than one year. Further, for the purposes of this application, employees who elect to receive employment security payments will not be included in the count that triggers payments to the Employment Security Fund in accordance with Article 4.1(d) of Appendix E.

It appears that following the execution of that document the parties were disagreed as to whether an employee whose job was abolished in a non-TO&O circumstance could claim protection in respect of the maintenance of basic rates (MBR). The Company took the position that the Agreement on Internal Wage Equity did not extend such protection, while the Brotherhood took the opposite position. The parties then registered a further agreement in the form of a letter dated January 8, 2002 which reads, in part, as follows:

> This has reference to our conversation this date in connection with Item 3 of the Agreement on Internal Wage Equity and in particular the rights, benefits and obligations of employees in relation to its application.
>
> This will serve to confirm the agreement reached between us that the intent of the parties in negotiating this provision was that the rights, benefits and obligations of the employee would be the same as ES status employees. In situations where a 10 day lay off notice is issued and it is known by the Company at the time of serving that the lay off would be permanent (the position would be abolished for a period of more than one year) the employee(s) affected or subsequently affected, will be considered as having attained ES status, and would have all of the rights, benefits and obligations identical to those that would be in effect for ES status employees, commencing on the date the lay off notice takes effect, except that the Company takes the position that MBRs pursuant to Article 8.8 of the JSA would not be applicable while the Brotherhood takes the position that MBRs pursuant to article 8.8 of the JSA would be applicable.

In approaching this dispute the Arbitrator has substantial difficulty with the position argued by the Brotherhood. Firstly, from a historical standpoint, it should be recognized that maintenance of basic rate protection has existed independently of employment security protection, and indeed substantially predated the introduction of employment security which first came into effect in or about 1985. So understood, maintenance of basic rates protection, while contained in the Job Security Agreement, cannot fairly be characterized as a benefit which is a subsidiary part of employment security. While it may be accurate to say that employees who are entitled to employment security benefits may also qualify for MBR protection, the two remain distinct benefits under the terms of the JSA. It is therefore not surprising that employment security benefits are provided for under a separate provision of the JSA, article 7, while maintenance of basic rates is dealt with under the provisions of article 8. Significantly the language of article 8.8 of the JSA specifically provides that a technological, operational or organizational change is a pre-condition to entitlement to MBR protection for eligible employees, including employees entitled to employment security status. In that regard the article provides, in part, as follows:

> **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

> **(a)** first accepts the highest-rated position at his location to which his seniority and qualifications entitle him; or …

On what basis can the Arbitrator conclude that the parties agreed to accord MBR protection to employees who are permanently laid off in a non-TO&O situation? As is evident from a close review of the language of article 3 of the Agreement on Internal Wage Equity, there is no reference to any part of the JSA that involves MBR protection. The election of options 1, 2, 3 or 4 of article 7.14 of the JSA concerns separation allowances, bridging benefits, lump sum severance payments and educational training. There is, very simply, nothing within the document to suggest that the parties agreed or mutually intended to accord MBR benefits to employees whose positions are abolished for a period of more than one year.

How, then, can the letter of January 8, 2002 be viewed as any such agreement? If anything, the language of that document expressly states the parties' disagreement with respect to the application of MBRs in the non-TO&O situation. With respect, the Arbitrator cannot agree that a phrase such as "will be considered as having attained ES status" and the related rights and benefits of ES status employees as conferring the entitlement to maintenance of basic rates protection in a situation other than one of technological, operational or organizational change, as traditionally contemplated under the JSA. Nor does the fact that the Company has apparently granted some benefits which are available to employees on ES, such as lump sum relocation allowances, a compelling basis to conclude that the parties also intended to confer the benefit of MBR protection.

It goes without saying that to establish, as the Brotherhood seeks to do, an agreement for a radical departure from the long standing administration of the maintenance of basic rates provisions of the JSA, there should be clear language negotiated which confirms the conferring of that benefit. The language of the two agreements placed before the Arbitrator makes no direct reference to MBR protection, save for the explanatory note that the parties categorically disagree that such a protection was intended to extend under the terms of the Agreement on Internal Wage Equity.

Moreover, from a purposive point of view, the interpretation advanced by the Company, which the Arbitrator feels compelled to accept, is more understandable. Extending to employees the ability to participate in the benefits of the ES fund, a fund which is effectively administered by the Brotherhood and does not involve ongoing cost to the Company, resulted in no additional cost liability to the employer. That would obviously not be the case if there had been an agreement with respect to also extending MBR protection to a non-TO&O circumstance, in a direct contradiction of the categorical language of article 8 of the JSA. While it may be open to the parties to make such an arrangement, an arbitrator must require clear and unequivocal language to sustain the conclusion that they did. No such language is before me in the present dispute.

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

March 15, 2002

(signed) MICHEL G. PICHER
ARBITRATOR