CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3317

Heard in Montreal, Thursday, 12 December 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

The announced intention of the Company, contained in a letter dated August 23, 2002, to cease including incumbency payments in the calculation of earnings for the purposes of the employees' incumbency and the announced intention to make that change in policy retroactive to January 1, 1998.

BROTHERHOOD'S STATEMENT OF ISSUE:

The company has indicated that in calculating an employee's basic weekly pay pursuant to 78.13(a) of agreement 1.1, it intends to change its practice and cease including incumbency payments made during the previous year in the calculation of earnings.

The Brotherhood has consistently taken the position that these amounts qualify as earnings and are to be included in the calculation of an employee's basic weekly pay pursuant to article 78.13 of agreement 1.1.

Prior to the August 23, 2002 letter, that had also been the approach to the calculation of earnings adopted by the Company. This was despite an announced intention in November of 1997 to exclude incumbency payments from the calculation of earnings. That announced intention was never acted upon and, as a result, the Brotherhood did not raise the issue in either the 1998 or the 2001 rounds of bargaining.

The Brotherhood's positions is that the collective agreement requires that incumbency payments be included in the earnings calculation. In the alternative, it is the Brotherhood's position that if the collective agreement does not support this interpretation, the Company is estopped from changing its practice until the Brotherhood has had the opportunity to address the issue in the next round of negotiations.

The Company's position is that the collective agreement permits their interpretation and that they are entitled to make the change in the calculation of earnings.

COMPANY'S STATEMENT OF ISSUE:

The Company had undertaken a periodic review of the costs associated with the maintenance of earnings provisions as it related to locomotive engineers and trainmen.

As a result of that review it was determined that some employees, who had more than one incumbency were actually receiving maintenance of earnings that were not only based on the basic weekly pay but also on the amount of any top up paid as an incumbency. In effect monies paid for incumbency, that were not earnings, were being used to inflate the basic weekly pay. This amounts to pyramiding of monies not earned and results in a financial detriment to the Company.

This is contrary to the Company's interpretation of the collective agreement 1.1, article 78.13(a) to (e) and Addendum 68.

The Company had indicated by letter dated 23 August 2002, addressed to the Brotherhood of Locomotive Engineers and the United Transportation Union that "effective immediately, the company will apply the strict interpretation of "earnings" as stated in the attached, to all future cases of calculation of maintenance of earnings. Furthermore, the Company will review the situation of all employees awarded a maintenance of earnings since January 1, 1998, and will adjust those cases in accordance with this interpretation."

The Company does not agree with the Brotherhood's position that it is estopped from making such a change and that such change in calculation of earnings is permitted by the collective agreement and other jurisprudence.

Furthermore, the Company has not attempted to collect any monies that it may be owed back to January 1, 1998, but rather used that date to calculate forward to establish present day entitlements.

FOR THE BROTHERHOOD:

(SGD.) R. DYON
GENERAL CHAIRMAN, BLE CENTRAL

(SGD.) R. LECLERC
GENERAL CHAIRMAN, BLE LINES EAST

FOR THE COMPANY:

(SGD.) J. KRAWEC
MANAGER, HUMAN RESOURCES

There appeared on behalf of the Company:

J. Krawec	– Manager, Human Resources, MacMillan Yard
J. Torchia	– Director, Labour Relations, Edmonton
D. Fournier	– Assistant Manager, CMC, Edmonton
D. Laurendeau	– Manager, Human Resources, Montreal
Wm. McMurray	– Counsel, Montreal

And on behalf of the Brotherhood:

J. C. Morrison	– Counsel, Ottawa

R. Dyon	– General Chairman, Montreal
R. Leclerc	– General Chairman, Grand Mère
R. Lebel	– General Chairperson, UTU, Quebec
P. Vickers	– Vice-General Chairman
C. Smith	– Vice-General Chairman
G. Anderson	– Vice-General Chairperson, UTU

AWARD OF THE ARBITRATOR

This grievance concerns a disagreement between the parties respecting the calculation of an employee's "basic weekly pay" for the purposes of maintenance of earnings protection. The dispute is restricted to the circumstance of an employee who has the benefit of an additional incumbency as a result of a material change or material changes subsequent to the first material change which generated the employee's original incumbency.

At the root of the difference between the parties is the Company's concern that employees who are already beneficiaries of an incumbency generated by an earlier material change can, during the six month notice period of a second material change, change their working habits to increase their income, thereby generating a higher figure for their basic weekly pay, yielding an enhanced incumbency flowing from the second material change. The Company's concern is that in that circumstance an employee should not have the benefit of including his or her original incumbency payments in the calculation of basic weekly pay for the purposes of determining the subsequent level of incumbency. It submits that to allow that method of calculation results in an incumbency on an incumbency, which it asserts is out of keeping with the fundamental intention of

the maintenance of earnings provisions of the collective agreement. As the Company would have it, if including an employee's incumbency payments in the calculation of his or her basic weekly pay has the result of increasing their incumbency on the occasion of a second material change the incumbency should, to that extent, be stripped from the calculation of the employee's basic weekly pay for the purposes of establishing the incumbency.

The dispute has its genesis in a letter issued by the late A.E. Heft, Manager, Labour Relations, dated November 10, 1997, addressed to the General Chairmen of the then CCROU in Eastern Canada. That letter reads as follows:

> Gentlemen:
>
> Re: Maintenance of Earnings
>
> Please be advised that upon the expiration of the current CCROU agreements, the Company will apply the strict interpretation of "earnings" in the calculation of basic weekly pay, to be defined as the **actual earnings** paid for service, exclusive of incumbency payments.
>
> Sincerely,
>
> (sgd) A.E. Heft
> Manager, Labour Relations
>
> (*original emphasis*)

At issue is the calculation of an employee's basic weekly pay as applied to employees in road service, and the resulting incumbency of that employee in circumstances where the employer already had a prior incumbency in effect. The provisions of the collective agreement pertinent to this dispute are as follows:

78.13 (a) In the application of this article, the term "basic weekly pay" is defined as follows:

(1.) For an employee assigned to a regular position in yard service or hostling service at the time of displacement or lay off, 5 days' or 40 hours' straight time pay, including the shift differential when applicable shall constitute his or her "basic weekly pay".

(2.) For an employee in road service, including employees on spareboards, the "basic weekly pay" shall be one-fifty second (1/52) of the total earnings of such employee during the twenty-six full pay periods preceding his or her displacement or lay-off.

Note 1: When computing "basic weekly pay" pursuant to sub-paragraph (2) above, any pay period during which an employee is absent for seven consecutive days or more because of a bona fide injury, sickness in respect of which an employee is in receipt of weekly indemnity benefits, authorized leave of absence or laid off together with the earnings of an employee in that pay period, shall be subtracted from the twenty-six (26) pay periods and total earnings In such circumstances "basic weekly pay" shall be calculated on a pro-rated basis by dividing the remaining earnings by the remaining number of pay periods.

Note 2: Notwithstanding the provisions of sub-paragraph 78.13(a), the amount of basic weekly pay for an employee in road service will in no case exceed $1,600.

(b) The basic weekly pay of employees whose positions are abolished or who are displaced 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:

(1) 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 dispute as to the position with the highest earnings to which they must exercise seniority, the Company will so identify;

(2) they are available for service during the entire four-week period. If not available for service during the entire four-week period, their incumbency for that period will be reduced by the amount of the earnings they would otherwise have earned; and

(3) 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.

> **NOTE:** Employees will be allowed to book up to and including 12 hours rest (exclusive of calling time) without affecting their incumbency.

It appears clear to the Arbitrator that the mischief which gives rise to the Company's position is the fact that employees who already have an incumbency, and are given six months' notice of an additional material change which will result in the calculation of a second incumbency, have the opportunity to change their working habits, thereby increasing their earnings during that six month period. That enhances the calculation of their basic weekly pay over the fifty-two week period contemplated in article 78.13(a)(2.) of the collective agreement. That is the fundamental concern that prompted the original letter of Mr. Heft in 1997.

It is common ground that the Company did not implement the interpretation of the calculation of basic weekly pay reflected in that initial communication. Implicitly recognizing that the calculation of basic weekly pay had, since the inception of that concept in 1979, been consistently interpreted to include incumbency payments, the Company effectively put the Union on notice that it would revert to its view of the strict interpretation of the meaning of "earnings" in the calculation of basic weekly pay upon the conclusion of the collective agreement, at which point any estoppel based on past practice would come to an end. In fact, however, through two subsequent collective agreements the Company did not implement its interpretation. It justifies that result on the fact that the parties were engaged in extensive negotiations concerning the system of pay and the blocking system that would govern the work obligations necessary to

maintain an employee's entitlement to his or her maintenance of earnings. With the final resolution of those issues behind it the Company proceeded to act on its original intention. It appears that a review of incumbencies was undertaken by the Crew Management Centre resulting, in part, in the issuing of a letter to employees with incumbencies on August 23, 2002. That letter read, in part:

> … "that the actual earnings paid for service, exclusive of incumbency payments" would be used to calculate the basic weekly pay.
>
> This is to advise you that, effective immediately, the Company will apply the strict interpretation of "earnings" as stated in the attached to all future cases of calculation of Maintenance of Earnings.
>
> Furthermore, the Company will review the situation of all employees awarded a Maintenance of Earnings since January 1st, 1998, and will adjust those cases in accordance with this interpretation.
>
> (original emphasis)

On August 30, 2002 the Company sent out a number of letters to locomotive engineers advising them of the downward adjustment of their incumbencies by reason of what the Company considered to be the correct recalculation of their basic weekly pay.

The Arbitrator appreciates the concern which motivated the Company's attempt to adjust the calculation of basic weekly pay. That said, however, on a close examination of the language of the collective agreement I have some difficulty with the merits of the Company's initiative from a standpoint of contract interpretation. Before turning to the analysis of the provisions in question it is useful to recall the purpose of maintenance of earnings, as expressed by this Office in **CROA 3189** (supplementary award dated September 14, 2001):

> … The fundamental purpose of maintenance of earnings protections is to give to employees a degree of wage security in circumstances where material changes are initiated by the employer in such a way as to adversely impact their earnings. In that circumstance a formula is developed, based on the employee's prior rate of earnings over a fixed period of time, to ensure the continuation of the same rate of revenue for the employee so affected. An important condition of maintenance of earnings protections, however, is that the employee in question must protect the highest rate of service which his or her seniority will allow. Failure to do so triggers penalties with respect to the maintenance of earnings payments he or she may receive.

In the case at hand the Company is careful to stress that its interpretation of what it characterizes as the strict wording of article 78.13 in the calculation of earnings and basic weekly pay is never applied in such a way as to reduce the maintenance of earnings protections of an employee. Rather, its counsel stresses, it eliminates from the calculation of basic weekly pay prior incumbency payments to the extent necessary to ensure that past incumbency payments do not contribute to the increase of an employee's newly established incumbency, thereby avoiding what it characterizes as an incumbency paid upon an incumbency. Citing a number of specific examples, its counsel underlines the fact that the implementation of the Company's new policy does not result in the reduction of an employee's original maintenance of earnings protection. Rather, it ensures that incumbency payments are not included in the calculation of basic weekly pay if to do so results in a higher incumbency in the event of an additional material change impacting the employee in question.

The difficulty with the position presented by the Company is that it in fact involves two separate meanings of word "earnings" and the phrase "basic weekly pay". Where the calculation of an employee's basic weekly pay, including incumbency payments,

results in a higher incumbency the Company strips out, to the extent necessary, the past incumbency payments received from that calculation. On the other hand, if in fact the employee has not changed his or her work habits, and stripping out the incumbency payment from the basic weekly pay would result in a lower incumbency, the Company does not eliminate the incumbency from the calculation. In other words, for example, if including the incumbency payments of employee A in his or her formula of basic weekly pay for the computing of a second incumbency results in a higher incumbency, "earnings" for the purposes of calculating basic weekly pay are defined as not including prior incumbency payments received. If, in contrast, stripping out incumbency payments for employee B would result in him or her having a lower incumbency in the event of a second material change, the incumbency payments are, to that extent, not excluded from the meaning of "earnings" in the calculation of basic weekly pay.

It would seem to the Arbitrator axiomatic that the word "earnings" and the phrase "basic weekly pay" as they appear within article 78.13 of the collective agreement can only have one meaning, and must have the same meaning for all employees. However, the Company's position effectively results in an inconsistent or sliding standard with respect to the meaning of the word "earnings" in the calculation of "basic weekly pay", depending on whether including or excluding incumbency payments will result in an increase or a reduction of an employee's incumbency in the event of a second material change. There is, very simply, no language within the provisions of the collective agreement which would sustain the ability of the Company to calculate earnings or basic weekly pay differently for different employees, depending on the impact of

including or excluding the incumbency payments received from that calculation. As the Company would have it, for some employees the phrase “total earnings … during the twenty-six full pay periods” includes incumbency payments and for other employees it does not. In the Arbitrator’s view the most fundamental precepts of contract interpretation would not allow of such an inconsistency in the meaning of “total earnings” and “basic weekly pay” as those phrases appear within the language of article 78.13(a)(2) of the collective agreement.

While the Arbitrator acknowledges the purposive nature of the Company’s initiative and its wish to administer maintenance of earnings payments in a way consistent with the fundamental intention of the incumbency scheme, it cannot do so in a manner which disregards the plain words of the collective agreement which must be interpreted and applied consistently to all employees. Nor can the Arbitrator disregard the rule of consistency in contract interpretation. It would appear to the Arbitrator that the real mischief may be the fact that incumbencies are calculated, in part, on earnings made during the six month period following the notice of material change, a problem which could obviously be avoided if the parties should agree to make the calculation on the twenty-six pay periods preceding the notice of the material change rather than the one year period preceding the date of its implementation. Any such adjustment in the collective agreement must, however, be a matter for negotiation between the parties.

In considering the issue of contract interpretation in the instant case it is also, I believe, significant to appreciate that for more than twenty years the Company has

consistently applied the interpretation of the calculation of basic weekly pay which is urged by the Brotherhood in this grievance. At a minimum that practice, which went entirely unquestioned prior to the letter of Mr. Heft in November of 1997, is evidence of the intention of the parties that basic weekly pay and total earnings are to be calculated in the same way for all employees who are the subject of the maintenance of earnings provisions of the collective agreement, and that under the present wording incumbency payments received are to be included in that calculation. From the standpoint of practice, as well as contract interpretation, the position of the Brotherhood is the more compelling.

For the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that for the purposes of article 78.13 the words “total earnings” must be taken to include incumbency payments received, and that such incumbency payments must be included in earnings for the purposes of calculating an employee’s basic weekly pay. The Arbitrator so declares and directs the Company to compensate any employees adversely affected by the policy initiative which gave rise to this grievance.

December 17, 2002

(signed) MICHEL G. PICHER
ARBITRATOR