CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3516

Heard in Montreal, Tuesday, 11 October 2005

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Assessment of forty-five (45) demerits to Dennis Ness of Jasper, Alberta for "attempting to mislead the Company concerning your alleged permanent relocation to Calgary and seeking and accepting relocation funds to which not entitled."

JOINT STATEMENT OF ISSUE:

On February 11, 1999 the Union and the Company entered into a memorandum of agreement drawn up in connection with the sale of the Grande Cache, Grande Prairie and Smokey Subdivisions in Northern Alberta. Dennis Ness, who was working in Jasper at the time, was identified as an employee eligible to apply for certain benefits referred to within the memorandum of agreement.

In June 1999, Mr. Ness applied for relocation benefits pursuant to clause 13 of the February 11, 1999 memorandum based on his commitment to relocate from Jasper to Calgary. Mr. Ness transferred his work clearance and he commenced work in Calgary. Mr. Ness received a lump sum payment of $12,000 for relocation expenses in July 1999.

On February 1 and March 19, 2002, the grievor provided employee statements "in connection with the circumstances surrounding monies paid to you for permanent relocation to Calgary in July 1999." After the investigation was completed, Mr. Ness was assessed 45 demerits "for attempting to mislead the Company concerning your alleged permanent relocation to Calgary and seeking and accepting relocation funds to which not entitled." Additionally, the Company clawed back all monies forwarded to Mr. Ness.

The Union contends: **(1.)** The discipline issued to Mr. Ness is unjust. **(2.)** Mr. Ness was eligible for and has complied with all of the terms and conditions of the February 11, 1999 memorandum of agreement. **(3.)** The Company has acted improperly by investigating this matter over 18 months after the alleged actions of the grievor. **(4.)** The length of time over which the Company performed its investigation is prejudicial to Mr. Ness. **(5.)** The Company compromised the impartiality of the investigation by denying recesses and refusing to allow the grievor to ask questions relevant to the matter during the investigation.

The Union requests that the discipline assessed to Mr. Ness be expunged and that he be made whole for all losses incurred.

The Company disagrees with the Union's contentions and has denied their request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. A. HACKL	**(SGD.) K. MORRIS**
FOR: GENERAL CHAIRMAN	**FOR: VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

K. Morris	– Manager, Labour Relations, Edmonton
D. Gagné	– Manager, Labour Relations, Montreal
C. Joanis	– Manager, Labour Relations, Montreal

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
B. R. Boechler	– General Chairperson, Edmonton
R. A. Hackl	– Vice-General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

The grievor was hired in July 1984. He established his permanent work clearance in Jasper, Alberta in August 1996 as a conductor. The grievor was one of ten employees eligible to apply for relocation. The agreed conditions for those eligible employees who elected relocation are set out at paragraph 13 of the Memorandum of Agreement.

> **13.** Eligible employees, (as identified in paragraph 2), who choose to relocate to a location, pursuant to item 6(a) will be entitled to elect either of the following:
>
> **a)** Relocation benefits defined in Article 139 of Agreement 4.3; or
>
> **b)** In lieu of claiming any other benefits in Article 139 of Agreement 4.3, opt for an all inclusive lump sum payment of $27,000 for home owners and $12,000 for renters. These benefits shall apply to an eligible employee only once and will be subject to the following:
>
> **i)** must have 24 months cumulative compensated service.
>
> **ii)** must occupy unfurnished living accommodation.

Employees in the terminal at Jasper whose jobs were abolished or who were displaced from their classification as a direct result of the material change were entitled to maintenance of earnings. The grievor was not entitled to maintenance of earnings because he was an employee capable of holding a permanent position in his classification.

Joint employee information sessions were held in both the Jasper and Grande Prairie terminal to explain the terms and conditions of the operational changes flowing from the Memorandum of Agreement. The grievor attended one of those sessions in Jasper. Employees were provided with declaration forms which were to be returned by June 26, 1999. The grievor submitted his declaration form on June 23, 1999 indicating that he was applying for a relocation credit as a homeowner. The grievor also identified several relocation choices including Vernon, B.C. as well as Calgary, Edmonton and Edson, Alberta. The grievor elected to relocate pursuant to item 13(b) of the Memorandum of Agreement, which involved a lump sum payment of $27,000 in lieu of relocation benefits provided in the collective agreement under article 139. The grievor was notified on June 30, 1999 that he was successful in his bid for a relocation credit.

The grievor had indicated in his declaration form that he was a homeowner. His declaration form indicates that he was "to sell private", in reference to his existing home. (The grievor's home was actually located in Sherwood Park, just on the outskirts of Edmonton. His wife and daughter lived in Sherwood Park and the grievor commuted to Jasper). It is also worth noting that the declaration requested some backup documentation from the applicant to verify home ownership. In that regard, the form contains the following endorsement:

> Note: for homeowners, a copy of the last municipal tax statement or mortgage forms must accompany this form when it is faxed in.

The grievor was initially turned down for the lump sum payment because his home was in Sherwood Park and not in Jasper. The Company reconsidered its position and agreed it would pay the relocation lump sum on the condition that the grievor sold his home in Sherwood Park and on the condition that the grievor would relocate his home to Calgary. On July 7, 1999 the grievor forwarded a copy of a hand-written real estate purchase contract

indicating that he had sold his residence in Sherwood Park to his spouse for the sum of $1.00. The Company initially refused to accept the sale because it was described as a non-arm's length sale between family members below market value and therefore did not qualify for the release of the $27,000 lump sum.

The grievor indicated to the Company that he was committed to moving to Calgary and, on that basis, the Company advanced him $12,000 to assist him as it had done for other employees who were renters and not homeowners pursuant to article 13(b) of the Memorandum of Agreement. He was told at the time that he would be considered eligible for full relocation benefits and would receive the balance of the relocation funds of $15,000 once he confirmed an arms-length sale of his residence in Sherwood Park. On July 7, 1999 the grievor forwarded a copy of a handwritten rental agreement indicating that he had secured living accommodation at 724 14th Street SE in Calgary, effective July 11, 1999.

The grievor maintains that it was his initial intention when he applied for the relocation allowance to move his permanent residence to Calgary along with his family and possessions. He expected to rely on the homeowner's relocation lump sum to purchase a new home. The grievor also anticipated that he would qualify for maintenance of earnings and would therefore be able to afford the higher cost of living in Calgary. The grievor claims that it was not until he had closed his bid for relocation that he was advised that he was not eligible for maintenance of earnings and that he would have to sell his home to receive the relocation benefits. The grievor further maintains that he would never have bid the relocation bulletin had he known that he was ineligible for maintenance of earnings.

The Union filed a policy grievance on July 30, 1999 (amended August 4, 1999) concerning the release of relocation benefits to employees affected by the closures. The Union claimed in the grievance that the only requirement of the Memorandum of Agreement was that the employee had to be a homeowner, hold a permanent residence in Grande Prairie or Jasper on May 12, 1998 and indicate that they would be relocating to another CN terminal. The Union pointed out that there was no mention of a homeowner having to sell their property prior to receiving relocation benefits. The Union sent follow-up correspondence to the Company on August 31, 1999 citing

Arbitrator Picher's findings in **CROA 2801** that "failing language to the contrary, there is no requirement to buy property at the new location or sell property at the previous location."

On September 13, 1999, the Company provided the Union with its Step III response to the policy grievance dated July 30, 1999. In that response, the Company referred to **CROA 2801** and **CROA 2947**. In particular, the Company pointed to the following excerpt from **CROA 2947** which reads as follows:

> That is precisely the conclusion reflected in the award of the Arbitrator in **CROA 2801**. While that award confirms that an employee might retain the original dwelling home, or indeed leasehold apartment, and nevertheless be entitled to the payment of the lump sum, an essential condition of qualification is that the employee relocate their principal residence, which in the context of article 6 of the Job Security Agreement, means relocating their household and family. …

The Company then went on to state to the Union that it was accepting the intent of the awards in **CROA 2801** and **2947** and would therefore review all outstanding claims related to the line transfers. In addition, the Company asked the Union to undertake to secure specific details confirming that:

> … employees had relocated their household and family, i.e. securement of unfurnished accommodation (lease or rental agreement) and registration of children in school in new location.

The Company emphasized that those employees who did not relocate their families, and provide proof of the relocation, would not be entitled to the lump sum payment on the basis of the criteria set out in **CROA 2947**.

The grievor communicated with the Company on March 20, 2000 setting out his position that he would not be required to sell his home in order to claim the balance of the homeowner's relocation benefit of $15,000. The Company responded to the grievor indicating that he would be paid the $15,000 if he confirmed the sale of his principal residence or if he confirmed the relocation of his family and household to a new work location. On April 12, 2000 the grievor forwarded a copy of a Calgary Board of Education transfer notice indicating that his family was relocating to Calgary and that his daughter had been registered at a local school in Calgary. The form indicated that

the reason for the transfer was "parents moving". In addition, the form indicated a street address in Calgary of #201, 812 8th Street SE.

The discrepancy between the two Calgary addresses was discovered by the Company in July 2001 through a general audit process. The Company tried to contact the landlord identified in the grievor's handwritten rental agreement to 724 14th Street NE provided in July 1999. The landlord's number was no longer in service. The Company contacted the grievor and questioned him about the discrepancy in the addresses and advised him that his landlord's telephone number was no longer in service. The grievor responded that he had relocated to #201 – 812 8th Street SE. The Company then instructed the grievor that he was required to confirm that he had in fact relocated to Calgary and had secured living accommodation in Calgary between July 1999 and June 2001. The grievor at the time advised the Company that although his alleged landlord at both of the addresses in Calgary was his relative, she was a retired lady who refused to provide him with confirmation that he rented the accommodations. The Company then asked the grievor to provide copies of any utility bills he would have paid in Calgary. The grievor responded by indicating that the utilities were included in the rent. The grievor was asked the same question about his lack of documentation to support that he lived in Calgary from July 1999 to October 2001 at his investigative hearing dated March 19, 2002. The grievor responded as follows:

> Because she is very eccentric [his relative] for one thing and she did not want to claim the income on her income taxes, so she did not provide receipts. She is a widow who lives on her own.

The grievor claimed that he was renting an apartment in Calgary and was contributing mortgage payments towards his home in Sherwood Park from August 1999 through to June 2001. The grievor accepted temporary clearances in tandem to Edmonton, Jasper and Calgary during this period. In addition to covering the cost of these accommodations, the grievor claimed he was paying all travelling expenses related to his physical relocation to a different clearance. By June 2001, his endeavours to maintain simultaneous accommodations had become too expensive and he accepted a permanent clearance in Jasper.

The Union claims that the grievor was not in a position to move his family and possessions until a move was financially tenable. The feasibility of a move was premised on his relocation entitlements under the Memorandum of Agreement. The Company maintains that the grievor attempted to mislead the Company concerning his permanent relocation to Calgary and accepted benefits to which he was not entitled. For this reason, the advance was recovered and he was assessed forty-five demerits.

The Arbitrator notes that although the grievor did report for work in Calgary during the two year period in question, his work history reveals that he exercised his seniority back to Edmonton several weeks after starting work in Calgary. During the period of July 1999 through to October 2001, the grievor actually reported to work in Calgary on only three occasions. In that regard, he worked seven tours of duty during the first two weeks in August of 1999. He only returned to work five more times in Calgary over the next two years. The grievor's response is that he was unable to cover the cost of his accommodations by simply being paid yard wages in Calgary. Accordingly, he was required to accept temporary clearances wherever he could in order to meet his expenses before finally relocating on a permanent clearance back to Jasper.

The grievor was in a position where he had to comply with certain conditions in order to receive relocation benefits. Initially the Company required the grievor to actually sell his home in order to receive benefits. The Company modified its position after the Union filed its policy grievance in July 1999 to one that the grievor would at least have to demonstrate that he was relocating to a different area. In response to a request for proof of relocation, the grievor told the Company that he was relocating to Calgary and provided the requested acknowledgement of residency and a school transfer form.

The school transfer form was a response to the Company's request that the grievor show some evidence that he was actually moving and relocating to another area. This was a reasonable request just as the Company's request for mortgage confirmation or tax rolls found in the relocation declaration to substantiate a land transfer was reasonable. There has to be some means available to the Company to verify the relocation and there is no substantive evidence to satisfy that requirement in this case.

The evidence supports a clear inference that the grievor was not prepared to abide by the central requirement of the parties negotiated Memorandum of Agreement of having to fully relocate his family residence to another area. The fact that the Company changed its position on the need for him to sell his home does not alter the fundamental fact that the grievor was aware he had to relocate elsewhere in order to claim the relocation benefits. The requirement to move, after all, is the basis for the "relocation" incentive under Article 13 of the Memorandum of Agreement.

The grievor has not demonstrated that he established any kind of permanent residence in Calgary. The handwritten lease form and the school form show two different Calgary addresses. The grievor has been unable to produce any supporting documents in the form of bills or otherwise that he ever lived at those addresses. His response that his relative did not want a paper trail in order to avoid paying taxes is, in the view of the Arbitrator, a transparent and self-serving attempt to cover up for his story that he intended to move to Calgary all along.

The grievor's work pattern over the two years demonstrates that he was very rarely working in Calgary. There is also no evidence that he even attempted to move his family to Calgary as he was required to do. Overall, I find no evidence to support his assertion that he intended to move to Calgary on a permanent basis. In fact, the evidence clearly supports the conclusion that he was trying to capitalize on a windfall of $27,000.00. But for the Company's timely audit, he was almost successful in his plan.

The scheme of the grievor to obtain $27,000 in relocation funds from the Company amounts to a serious transgression and warrants an equally serious disciplinary response. Having considered all the evidence and submissions of the parties, the Arbitrator is not disposed to alter the discipline under the circumstances.

The Arbitrator would add that there is no basis to suggest that the investigation was unfair. Although the investigation took some time, it was understandable given the need to piece together all the evidence required to

prove with clear evidence, as the Company has done here, that the grievor never intended to relocate to Calgary. Finally, I find no evidence that the grievor was compromised at the investigative hearing nor, in particular, was there any obligation on the investigating officer to answer the written questions put to him by the grievor. It was the grievor who was under investigation for his alleged transgressions.

For all the above reasons, the grievance is dismissed.

October 18, 2005

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR