CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3599

Heard in Montreal, Thursday, 14 December 2006

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS OF AMERICA (LOCAL 2004)

DISPUTE:

Grievance of Prince George, BC, employees Don Kennedy and Rick Ball, Article 8 Job Abolishment Notice.

JOINT STATEMENT OF ISSUE:

On November 10, 2004, the Council of Trade Unions and CN reached a Comprehensive Memorandum of Settlement that provided for a number of benefits for employees on BC Rail that would be impacted by the sale of BC Rail. Article 5 of the memorandum provided for early retirement and severance benefits that employees that would be entitled to that would be adversely affected by the implementation of Article 8 (Job Abolishment) notices. On January 10, 2005, CN issued notice to the Union outlining a number of staff reductions that would be effective May 9, 2005. This notice identified the following staff reductions at Prince George: One (1) Pipefitter, Five (5) Heavy Duty Mechanics. On January 13, 2005, CN advised the incumbent employees holding these positions of the benefits entitled to them.

On February 27, 2005, Mr. Kennedy advised Mrs. Crossan that on May 9, 2005, he would go on vacation and then retire as per the Memorandum of Settlement. On May 9, 2005, a dispute arose as to whether or not the Article 8 notices issued to the Union and employees were in effect. A letter was given to Mr. Ball and Mr. Kennedy on May 10, 2005. On June 3, 2005, the Union filed a Step 1 grievance contenting proper notice was given to the Union as per the collective agreement and that there was no change in that notice by the employer as per the terms of the collective agreement.

It is the Union's position that the employer abolished the positions and did not change the effective date in accordance with the collective agreement and therefore the positions are abolished. And that the affected employees are entitled to the negotiated settlement in the November 10, 2004 memorandum of settlement.

The Union requested that the Company review their decision and pay the affected employees the terms negotiated in the memorandum of settlement of November 10, 2004.

The Company contends that neither Mr. Ball nor Mr. Kennedy were adversely affected. Both employees are able to hold positions in the same location which renders them ineligible under the terms and conditions of the Memorandum of Settlement.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) A. KANE	**(SGD.) D. BRODIE**
STAFF REPRESENTATIVE	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

D. Brodie	– Manager, Labour Relations, Edmonton
A. DeMontigny	– Sr. Manager, Labour Relations, Montreal
D. Crossan	– Manager, Labour Relations, Prince George
B. Bjarnason	– Work Equipment Supervisor, Prince George

And on behalf of the Union:

M. Piché	– Staff Representative, Toronto

AWARD OF THE ARBITRATOR

The instant case concerns the application of an article 8 notice issued to the Union on January 10, 2005. That notice indicated the abolishment of a number of positions, including five heavy duty mechanic positions and one pipefitter position at Prince George. The notice came shortly after a memorandum of settlement made between the Company and the Council of Trade Unions for BC Rail, dealing with the integration of former BC Rail employees into the operations of the Company. The article 8 notice covered positions which were then held by the grievors, Mr. Rick Ball and Mr. Don Kennedy. In addition to the notice provided to the Union, the individual employees received notice of their right to claim early retirement benefits under the memorandum of settlement of November 10, 2004, in the even that they should be adversely affected

by the job abolishments. To that effect, the letter issued to Mr. Kennedy dated January 13, 2005, reads as follows:

> Dear Mr. Kennedy:
>
> Re: Early Retirement under the Memorandum of Settlement Dated November 10, 2004
>
> As an employee adversely affected by the Notice of Operational and Organizational change issued January 10, 2005 and eligible to retire under the BC Rail Pension Plan rules you may be entitled to receive a lump sum payment of $50,000.00 (less applicable taxes). You may elect to receive these monies in two payments over a period not greater than thirteen (13) months.
>
> Under Revenue Canada guidelines you may elect to transfer $40,000 as a retiring allowance without impacting your RRSP limit. I Have included a TD2 for your convenience should you elect this option.
>
> Please be advised that the Heavy Duty Mechanic positions identified on the Notice of Change are currently under review and subject to change within the notice period.
>
> Should you have nay questions regarding the memorandum of settlement, please call [me] at …

It does not appear disputed that both Mr. Kennedy and Mr. Ball informed the Company that they wished to elect retirement and receive the $50,000 lump sum payment described in the letter of January 13, 2005. The Company took the position that the actual shake-out of the job abolishments had not yet been determined, and whether or not the grievors were in fact adversely affected by the article 8 must await the unfolding of events during the notice period. In fact, at the conclusion of the notice period, on May 10, 2005, they were advised in writing that they should continue in their work as heavy duty mechanics, and that their continued return to work would not impact their entitlement to the benefits of the memorandum of settlement if in fact it should be determined that their positions were adversely affected.

The Company takes the position that events during the notice period effectively overtook the article 8 notice, so that the grievors never were in fact adversely affected by the job abolishments. In that regard it notes that four people who held permanent heavy duty mechanic positions in the bargaining unit at Prince George successfully transferred to other jobs in the mechanical department wheel shop, within the bargaining unit of the CAW. A fifth heavy duty mechanic remained off work by reason of an injury and ultimately resigned effective July 17, 2006. Additionally, three new permanent heavy duty mechanic positions were bulletined for Prince George on March 11, 2005. Only one qualified person bid on those positions. In addition, Heavy Duty Mechanic George MacDonald moved out of the Work Equipment Department to a heavy duty mechanic position elsewhere within the Company in April of 2005. In the result, according to the Company, the grievors were not in fact adversely affected by the article 8 notice of January 10, 2005, because attrition had opened a number of positions which they had the seniority and qualifications to fill. Those positions essentially were the five unfilled heavy duty mechanic positions which were to continue in place at Prince George. Nor, the Company argues, can it be said that this came as a surprise to the grievors. The unchallenged representation of the Company's representative is that as events unfolded, and well prior to the effective date of the article 8 notice, the supervisor of Mr. Ball and Mr. Kennedy, Mr. Brian Bjarnason, repeatedly explained to them that there would be continuing work available for them beyond the effective date of the notice of their job abolishments.

The Union's representative submits that the grievors were adversely affected by the abolishment of their positions and that they should have been entitled to retire in accordance with the provisions of the memorandum of settlement. Alternatively he argues, at a minimum, that the Company cannot purport to have continued the grievors in their employment as it did not provide to them any written notice that in fact there would be work available to them until the expiry of the notice period on May 10, 2005.

The Arbitrator has substantial difficulty with the Union's submission in this matter. At issue is the application of article 5 of the memorandum of settlement of November 10, 2004. It reads, in part, as follows:

> 5) Options for employees adversely affected by Article 8 notices served on the Council or its constituent sub-units prior to the final decisions of the Canadian Industrial Relations Board on the integration of the bargaining units, will be as follows:
>
> a) For employees eligible to retire under the BCR Pension Plan rules, whose retirement will create a vacancy in the same classification and at the same location so as to save an adversely affected employee from lay-off (except where the classification at the location is being eliminated), will be entitled to a lump sum payment of $50,000 (less applicable taxes). To receive said payment, the employee must resign and retire. Employees who are not members of the plan and are over age 55, with a minimum of 2 years company service, will also be eligible to the above lump sum amount provided they resign. Employees who are 54 years of age prior to the effective date of the Article 8 will receive a lump sum of $50,000 provided they resign. Employees receiving the benefits of this subsection must exhaust all vacation and/or banked time prior to resignation.

As can be seen from the foregoing, a condition precedent to an individual claiming the $50,000 lump sum payment is that they must first qualify as an employee "adversely affected" by the job abolishments. Secondly, if they are, they can take the

lump sum if their retirement should free up a position for another person who would otherwise be laid off. On a careful review of the facts, the Arbitrator is compelled to conclude that neither of those conditions obtained in the case of the grievors. It is not disputed that there were no employees junior to the grievors who faced job abolishments and job losses by reason of the article 8 notice. The grievors' departure would in fact have done nothing more than compel the Company to hire additional employees.

More fundamentally, how can it be said that the grievors were in fact adversely affected? When the notice period was exhausted they had ample work, effectively in the same location and in the same classification, with no real significant change in their terms and conditions of employment. Because of the movement of other employees and the attrition which came to bear in the department there was simply no adverse effect upon them by reason of the article 8 notice of January 10, 2005.

It is important to bear in mind the purpose of a lump sum payment such as the $50,000 payment which is the subject of this dispute. Such payments are negotiated between company and union for clearly understood purposes, not the least of which is to provide an incentive for the retirement of senior employees where to do so would avoid what would otherwise be the layoff of junior employees. The balance struck results in a gain for the advantaged senior employee who receives the monetary incentive, and greater efficiency for the Company, to the extent that it avoids displacements and downstream layoffs. In the case at hand none of those elements

would come to bear. As noted above, there were no junior employees whose jobs would have been saved by reason of the grievors opting for retirement and the lump sum payment. More importantly, the grievors simply cannot show that they were in any way adversely affected by the job abolishments, by reason of the job attrition which took place during the notice period.

Prior arbitral awards have been clear about the entitlement of the Company to take attrition into account in determining whether employees can be said to have been adversely affected by an operational or organizational change. In that regard, in **SHP 345**, the following comment was made:

> One point of principle which the Arbitrator accepts, apart from those related in the jurisprudence cited above, is that the Company is entitled to take into account attrition in its complement of employees in determining whether an operational or organizational change can be said to have adverse impacts on employees. If a group of 100 employees is affected by the abolition of ten positions, while at the same time ten employees quit, retire or are discharged for cause, it can be said that the operational change has impacted the work force in that it has reduced the complement of employees from 100 to 90. To the extent, however, that no employees are laid off, it cannot be asserted that there has been an adverse effect on employees caused by the operational change. On that basis the Arbitrator accepts the position of the Company. In considering whether any change which it has implemented might be an operational or organizational change, requiring a notice under Article 8.1 of the ESIMA, it must be found that no such notice is required where the job abolishments are offset by contemporaneous attrition in the bargaining unit. Article 8.1 of the ESIMA is concerned with operational or organizational change "... of a permanent nature which will have adverse effects on employees ...". Where it is established that attrition has cushioned the blow of any particular job abolishments, to the extent that any particular job abolishment can be matched with an identifiable incidence of employee attrition, article 8.1 of the ESIMA has no application.

I am satisfied that the foregoing analysis applies in the case at hand. To allow this grievance would be to effectively grant a windfall to two employees who effectively

suffered no disadvantage by reason of the article 8 notice issued on January 10, 2005. Their circumstances are plainly not, I am satisfied, within the contemplation of the agreement which the parties made in their memorandum of settlement of November 24, 2004. For these reasons the grievance must be dismissed.

December 18, 2006

(signed) MICHEL G. PICHER
ARBITRATOR