CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

SUPPLEMENTARY AWARD TO CASE NO. 3891

Heard in Montreal, Tuesday, 13 April 2010

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

On Thursday, 14 October 2010, there appeared on behalf of the Company:

R. Hampel	– Counsel, Calgary
J. Cuddihy	– Counsel, Montreal
A. A. Garcia	– Director, Labour Relations, Calgary
B. Deacon	– Labour Relations Officer. Calgary
D. Burke	– Labour Relations Officer, Calgary

And on behalf of the Union:

D. Lavoie	– Counsel, Montreal
D. Généreux	– General Chairman, Montreal
T. Beaver	– General Chairman, Oshawa

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The award herein, dated May 17, 2010, concluded that the Company was not entitled to unilaterally cancel Blue Cross coverage for Quebec retirees between the ages of fifty-five and sixty-five. Its decision to unilaterally announce that those employees would no longer be entitled to that protection as of January 1, 2010 and would be placed under the Company's national Health Spending Account Plan (HSA) was effectively struck down by that decision of this Office. With respect to the remedy that would be appropriate, the Arbitrator remitted the matter to the parties in the following terms:

> In its request for relief the Union has asked for an extensive list of orders and directions by the Arbitrator. However, I believe that it may be more constructive, for the time being, to simply provide to the parties the declarations and conclusions of this award, giving them the first opportunity to discuss together the most appropriate means of fashioning remedial relief for the Quebec retirees who are the subject of this dispute. Should they be unable to agree on all terms of the appropriate remedy, the matter may be returned to this Office, and I retain full jurisdiction with respect to the ultimate fashioning of any remedy or remedies, if necessary.

The Union has advised this Office, by letter dated August 12, 2010, that the parties were unable to agree upon an appropriate means of redressing the employees. It therefore asked that the hearing be reconvened to hear the parties' submissions with respect to that question. It is in respect to those submissions that this award now issues.

It is common ground that following award of May 17, 2010 the parties did have some discussions with respect to the best means of remedying the situation for Quebec retirees between the ages of fifty-five and sixty-five. It became immediately apparent that they were not *ad idem* as to how that should be done. The position of the Union is that the employees in question should be given the full flexibility of the HSA which applies to other employees in Canada. However, in the Union's view, the monetary value of the HSA must be topped up to meet the financial equivalent of the protections available under the **Quebec Drug Act**.

The Company resists that solution, arguing that in fact it would create superior benefits for the Quebec retirees, to the extent that their HSA would in effect involve an larger envelope of money that would be given to retirees in other provinces. The solution which the Company proposes, and indeed which it has adopted, is that the retirees in question be restored to the full protection of the Blue Cross plan which was unilaterally terminated by the Company effective January 1, 2010. It maintains that restoring the Quebec retirees to the Blue Cross plan fundamentally resolved the issue which gave rise to the grievance, prompted as it was by the notification to the Company from the Government of Quebec that its HSA plan did not meet the minimum statutory requirements of the **Quebec Drug Act**. In the Company's submission the restoring of Blue Cross benefits obviates that problem and essentially fulfills what it maintains was the mutual intention of the parties as reflects in LOU #6, a letter of understanding reached between the parties with respect to how to deal with the problem of the national HSA not meeting the requirements of the Quebec legislation. The letter in question reads as follows:

> Dear Sirs,
>
> This refers to our discussions surrounding your concerns regarding the inability to provide Health Spending Account (HSA) benefits to retirees in Quebec under the age of 65 due to Quebec provincial regulations.
>
> To address this concern, it was agreed that within 6 months of ratification, the parties would explore either modifying the current Blue Cross plan or designing a new plan to be offered to Quebec retirees under the age of 65. Any modification or new plan will be guided by the following principles:
>
> – Greater flexibility will be provided regarding choice of benefits.
>
> – The plan must meet the minimum applicable regulatory requirements.

– The cost of the plan will not exceed the cost associated with the provisions of HSA benefits under the current collective agreement provisions.

It is further recognized that should the regulations in Quebec or their application change that would permit the current HSA plan for retirees under the age of 65 to be put in place, the current HSA plan would be implemented.

If this accurately reflects our conversation, please indicate your concurrence by signing below.

Yours truly,

J. Bairaktaris
Director, Labour Relations

Counsel for the Union submits that the solution advanced by the Company fails to honour what he characterizes as the obligations of LOU #6. In particular, he stresses that the Quebec retirees do not, as recipients of the Blue Cross protections which has been restored, have any flexibility with respect to their plan as would be the case under the HSA. He argues that the parties intended that the Quebec retirees would have nothing less than the standard of the statutory protection of the **Quebec Drug Act** while also enjoying the advantage of the flexibility available under the HSA, a plan which allows retirees a certain discretion in the expenditure of their prescription drug protection. While he acknowledges that for the Quebec retirees to have a topped up HSA of value equivalent to the protections of the **Quebec Drug Act** would give to the Quebec retirees a more costly HSA than the HSA of retirees in other provinces, he submits that that is simply the result of the operation of the law, and that the employer should be required to bear that cost.

Further, with respect to post award events, counsel for the Union notes that the Company's remedial action was to provide the Blue Cross protection in the form of a revised Blue Cross plan dated December 2009. The Union questions whether that plan is as generous as the plan which was put in effect between 2007 and 2009. He goes on to submit that in fact the Company has acted in bad faith. In relating the history of the events he notes that the Union accepted the employer's plan to establish an HSA system as it would give the Union's retirees greater flexibility. He relates that that proposal was reviewed with the members who approved it by a vote. Following the Union's acceptance the Company informed the bargaining agent that the plan was not in fact compliant with Quebec law and it then unilaterally imposed the Blue Cross protection on the Quebec retirees, it not being disputed that that plan does conform wit the **Quebec Drug Act**. The Union's grievance against that action resulted in LOU #6. Notwithstanding that letter, however, counsel stresses that no meaningful negotiation resulted and the Company then imposed its HSA on all of its retirees, including those in Quebec. That required the Union to grieve anew and led to the principal award in this file.

Counsel argues that in the principal award the Arbitrator noted that the Union should not be made to suffer the inequitable withdrawal of the Blue Cross protection without prior notice and without the ability to negotiate with respect to the protection of its members. Counsel submits that the same principle applies in the instant case, as the Company has again acted unilaterally, albeit by restoring the Blue Cross protection, but doing so in a way which deprives the Union and its retiree members of the advantage of the flexibility inherent in the HSA system.

While the Arbitrator understands the sentiment which motivates the Union. In approaching this matter I cannot adopt the Union's view with respect to the overall meaning and import of the provisions of LOU #6. I consider it important to appreciate that LOU #6 is, in the end, little more than an agreement to agree. To that extent it is of dubious enforceability under recognized principles of contract interpretation. Indeed, that was expressed in the award of May 17, 2010. At p. 21 of that award the arbitrator made the following comment:

> … While I would be prepared to conclude that LOU No. 6 is little more than an agreement to agree, and that it is arguably less than an enforceable recognition that the parties intended to import the standards of the **Quebec Drug Act** into their contractual arrangement, it is obviously clear from the language of the letter itself that the Company and the Union agreed in principle that their discussions during the closed period of the collective agreement should lead to an adjustment in the HSA benefits system which would satisfy the following statement drawn from the letter itself: "The plan must meet the minimum applicable regulatory requirements." …

In the Arbitrator's view the situation which the parties confronted. From January of 2007 the Company encountered difficulties finding a provider to administer its HSA plan in Quebec, given that in fact it was not compliant with the law of that province, the **Prescription Drug Insurance Act** (the Drug Act). Faced with that, at the bargaining table the parties agreed to the terms of LOU #6 and accepted that Blue Cross protection would be reinstated for the retirees. In doing so they set out the principles for what they conceived as their joint attempt to either modify the then current Blue Cross plan or designing a new plan for Quebec retirees under the age of sixty-five.

It soon became evident that an inherent conflict arose between the first principle agreed upon, greater flexibility for retirees with respect to their choice of benefits, and the third principle expressed, namely that “the cost of the plan will not exceed the cost associated with the provisions of HSA benefits under the current collective agreement provisions.”

As events have evolved, it is clear that the parties cannot have both of the above goals. If the HSA is to be provided to the value of the full Blue Cross protection, while flexibility will be established, its cost will plainly exceed the costs associated with the provisions of the HSA benefits originally established and still in effect in other provinces. Not surprisingly, therefore, while the parties may have agreed to agree in formulating LOU #6, they have obviously failed to do so. They failed to do so in the period following the execution of LOU #6 and leading up to the instant grievance and they have continued to fail to do so in the attempt to find common ground as to a remedy following the award of May 17, 2010.

How is this dispute to be resolved? It must be resolved by resort to first principles. It is trite to say that the cornerstone issue in most, if not all, aspects of collective bargaining is cost to the employer and monetary gain to the employees. That is so with respect to wages and with respect to benefits. In the light of that reality, in the Arbitrator’s view the more critical element of the parties’ understanding as expressed in LOU #6 must be viewed as their agreement that the solution found for the problem of the Quebec retirees must, as expressed within the third principle in LOU #6, be within a financial envelope that does not exceed the cost associated with the national HSA benefit plan. As is clear from the material before the Arbitrator, to remain within that envelope does not allow for the fulfillment of the objective of greater flexibility being provided with respect to the choice of benefits.

While I have concluded that LOU #6 is something less than an enforceable contract, even if I were satisfied that it is an enforceable contract and that the provision for flexibility has not been honoured, I would be compelled to conclude that that is an inevitable result of the frustration of the parties' intention by external factors, most particularly the requirements of the Quebec **Drug Act**. In my view it is not insignificant that for at least a time the Union did not object to the Company substituting the full protection of the Blue Cross plan for its Quebec retirees. It was only when that plan was unilaterally revoked and the HSA imposed on Quebec retirees that the instant grievance was brought forward. That, at a minimum, would tend to reflect view that the more important consideration, from the outset, was that whatever plan was established for Quebec retirees, it must meet the requirements of the Quebec **Prescription Drug Insurance Act**. While flexibility was obviously a desired end, it was obviously trumped, for at least a time, by the parties' wish to conform with the Quebec provincial standard, as indeed they must by law.

By its actions following the award in this grievance the Company has restored the parties to that situation. By providing the full protections of the Blue Cross plan to Quebec retirees it has satisfied the requirement of giving them nothing less that the minimum standards of the **Drug Act**. I am satisfied that by so doing the Company has honoured the spirit of the principal award herein, restoring the retirees to the protections which they had, with that restoring to continue at least until the parties return to the bargaining table. To put it perhaps in a more technical way, the retirees who are the subject of this grievance now have the same protections they enjoyed the day before the Company unilaterally terminated their Blue Cross protections. That is the action that was grieved and that is the action which is remedied by the Company's solution. As indicated above, while the value of flexibility is obviously one which the parties tried to implement, that obviously became impossible, particularly if they were to remain within the cost envelope which seemed to be a cornerstone principle of their understanding.

For all of the foregoing reasons the Arbitrator is compelled to accept the position of the Company and to reject the Union's request for additional remedies, including the requirement that the Quebec retirees be given a topped up HSA plan which would go beyond the cost of the national HSA plan. Should the Union have difficulty with that outcome it is a matter which it will obviously be in a position to take up when the parties return to the bargaining table. In the interim, the position of its retiree members has been protected by the solution implemented by the employer.

October 21, 2010

(signed) MICHEL G. PICHER
ARBITRATOR