

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1900

Heard at Montreal, Thursday, 16 March 1989

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Claim of Weekly Layoff Benefits under Article 4 of the Employment Security and Income Maintenance Plan for Mrs. J. Hayman effective January 15, 1988.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Brotherhood claims that Mrs. Hayman had fully exhausted her seniority at her Belleville Seniority Eligibility Territory on January 15, 1988, completed the appropriate forms issued by the Company and therefore should have been eligible for Weekly Layoff Benefits under Article 4 of the ESIMP effective from January 15, 1988.

The Company denied the claim on the basis that the matter was not properly before them under Article 2.7 of the ESIMP, because Article 13.3 of Collective Agreement governs an employee's eligibility for layoff benefits.

FOR THE BROTHERHOOD:

(SGD) TOM MCGRATH
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Company:

M. M. Boyle	– Labour Relations Officer, Montreal
G. Wheatley	– Manager, Labour Relations, Montreal
A. Watson	– Labour Relations Assistant, Montreal

And on behalf of the Brotherhood:

T. N. Stol	– Regional Vice-President, Toronto
R. E. Gee	– Representative, Toronto

AWARD OF THE ARBITRATOR

The Company raises a preliminary objection to the arbitrability of the grievance. It argues firstly that the grievance was not progressed to the Administrative Committee, as required by paragraph 2.8 of the Employment Security and Income Maintenance Plan (ESIMP), secondly that the time limits specified in paragraph 2.9 of the Plan have not been complied with and, lastly, that the Brotherhood did not request a joint statement of issue as required by clauses 5 and 8 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration. It maintains that any one of the foregoing defaults is fatal to the arbitrability of the grievance.

The grievance concerns the Brotherhood's claim respecting the entitlement of Mrs. J. Hayman of Belleville, Ontario to receive weekly layoff benefits under Article 4 of the Employment Security and Income Maintenance Plan for the period of January 15 to February 12, 1988. It is common ground that after the second of these dates Mrs. Hayman did receive such benefits.

It appears from the record that the Company and the Brotherhood were at odds with respect to whether the grievor's claim should, initially, have been progressed under the terms of the ESIMP, as the Brotherhood argues, or under the Collective Agreement, as was maintained by the Company. Whatever the merits of those respective positions, it is not disputed that the grievance was never referred to the joint Administrative Committee established under Article 2 of the ESIMP. While Article 2.7 contemplates that grievances with respect to the application of The Plan are to be "... progressed in accordance with the provisions of the applicable collective agreement ...", should no resolution result, then the terms of Article 2.8 apply. That article provides as follows:

2.8 Failing settlement of such dispute at the final step of the grievance procedure, should either party elect to progress the dispute it shall do so by referring it to the Committee, except that if the dispute is one involving the question of whether or not a change is a technological, operational or organizational one as contemplated under Article 8.1 of The Plan, then such dispute shall be progressed to arbitration under the provisions of the applicable collective agreement.

The following provisions are also pertinent:

2.9 The request to have the Committee adjudicate upon a dispute must be submitted in writing within sixty days of the date a decision was rendered at the final step of the Grievance Procedure. The request shall be submitted in writing to the Co-Chairmen of the Committee and shall be accompanied by a joint statement of issue and joint statement of facts. If the parties cannot agree upon such joint statement either or each, upon notice in writing to the other, may submit a separate statement to the Co-Chairmen of the Committee.

2.10 Except as otherwise provided in The Plan, in the event the Committee is unable to reach a decision on any question, any four members of the Committee may require the question to be referred to arbitration. ...

2.11 When a question has been referred to an Arbitrator as provided for in Article 2.10 hereof, the Arbitrator shall have all the powers of the Committee as set out in Article 3 hereof in respect of that question. The Arbitrator shall have no power to add to, subtract from, or modify any of the terms of The Plan or any other collective agreement. The decision of the Arbitrator shall be final and binding.

In the Arbitrator's view the proper focus for this grievance is in respect of the terms of the Employment Security and Income Maintenance Plan. That is so because the Brotherhood has the carriage of the grievance, and maintains that the rights of Mrs. Hayman fall to be determined pursuant to the terms of The Plan. The Company maintains that the time periods established for the taking of steps within the ESIMP are mandatory, and failure to observe them puts an end to the arbitrability of a grievance.

The merit of that position is the first issue to be resolved. It is well settled that the time limits within Collective Agreement 5.1 are mandatory. That is clear from the terms of Articles 24.8 and 24.9 of that agreement, which specifically provide that failure to progress claims within the prescribed time limits result in the claim being considered as dropped. It is noteworthy that those provisions are incorporated by reference into the Employment Security Income Maintenance Plan by virtue of the language of Article 2.7 of The Plan. Article 2.8 of The Plan then provides that following exhaustion of the grievance procedure under the collective agreement, an unresolved dispute

may be referred to the Administrative Committee. Article 2.9 specifically provides that such a referral "... must be submitted in writing within 60 days of the date a decision was rendered at the final step of the Grievance Procedure."

In the Arbitrator's view the terms of Articles 2.7, 2.8 and 2.9 of the ESIMP must be read together. Although The Plan does not itself contain a provision comparable to Articles 24.8 and 24.9 of the Collective Agreement, specifically providing that failure to abide by time limits is deemed abandonment, the folding into The Plan of the procedural provisions of the Collective Agreement, coupled with the use of the word "must" appearing Article 2.9 of The Plan lead compellingly to the conclusion that the parties intended the time limits within The Plan relating to the referral to the Administrative Committee to be equally mandatory. It would, in my view, be counter-intuitive to conclude that the parties would have intended that a grievance must be progressed in a timely fashion through several steps of the grievance procedure under the Collective Agreement, all of which are mandatory in their time limits, but that failure to progress the grievance to the next level of appeal, the Administrative Committee, should not be so viewed. Such an inconsistent result in the treatment of a grievance should not be inferred, absent clear language to support it. For these reasons, having particular regard to the mandatory terms respecting time limits found within the Collective Agreement incorporated by reference into the ESIMP, coupled with the use of the word "must" in Article 2.9, I am satisfied that the Brotherhood was under an obligation to respect the time limits imposed for referral of this grievance to the Administrative Committee under Article 2.9 of the Employment Security and Income Maintenance Plan.

It is common ground that those time limits were not met, and indeed no referral to the Administrative Committee was ever made. At the hearing the Brotherhood's representative submits that it would have been pointless to proceed before the Administrative Committee, since the initial position of the Company was that The Plan did not apply to the grievor's circumstances. The Arbitrator cannot accept that argument. The application or non-application of the ESIMP has been, and no doubt will be in the future, the very issue which parties have progressed to this Office under the terms of their collective agreement and, ultimately, the procedural terms found in Articles 2.8 and 2.9 of the ESIMP. There is nothing in principle to prevent the Brotherhood from having referred the instant dispute to the Administrative Committee, nor is there any suggestion in the evidence or material before the Arbitrator of any overt refusal on the part of the Company or its representatives to convene the Administrative Committee or to participate in its deliberations in respect of this matter. While the Brotherhood's contention might be more persuasive if such evidence were before me, the most that can be concluded in the instant case is that the Brotherhood proceeded on the surmise that it was pointless to proceed to the Administrative Committee and that such an initiative would not be allowed by the Company. In the circumstances the Arbitrator has no alternative but to conclude that the Brotherhood failed to follow the required procedures, in consequence of which I must conclude that the instant grievance is not properly before me. As is clear from the terms of Article 2.10 of the ESIMP, an issue may be referred to arbitration only once it is determined that the Administrative Committee is unable to reach a decision, and four members of the Committee have required the matter to be referred. That has not occurred in this case.

For the foregoing reasons the Arbitrator finds that the instant grievance has not been progressed in accordance with the terms of Articles 2.9 and 2.10 of the ESIMP, in consequence of which it is not arbitrable. For these reasons grievance is dismissed.

March 17, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR