

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2445

Heard in Montreal, Thursday, 13 January 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Track Maintainer J.V. Scott that he should be permitted to exercise his consolidated seniority rights.

EX PARTE STATEMENT OF ISSUE:

On October 1, 1989, the Company implemented its Track Force Mechanization through the medium of an article 8 notice issued pursuant to the Employment Security and Income Maintenance Plan (ESIMP). The grievor, like all other track employees, was affected by this article 8 notice. Since that time, the grievor held a variety of temporary positions. At the conclusion of the latest such position he found that he could no longer hold work in his Supplemental. As such he requested that he be able to exercise his consolidated seniority pursuant to the ESIMP. The Company denied this request.

The Brotherhood contends that, by taking the action it did, the Company violated article 7, article 8 and Appendix G of the ESIMP, as well as any applicable provision of the collective agreement.

The Brotherhood requests that the grievor be allowed to exercise his consolidated seniority as per the ESIMP and that he be compensated for all loss incurred as a result of this matter.

The Company denies the Brotherhood's contentions and declines its requests.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

N. Dionne – Manager, Labour Relations, Montreal
M. Hughes – System Labour Relations Officer, Montreal
A. L. Marshall – Engineering Officer, Moncton

And on behalf of the Brotherhood:

P. Davidson – Counsel, Ottawa
R. A. Bowden – System Federation General Chairman, Ottawa
G. D. Housch – Vice-President, Ottawa
D. W. Brown – Senior Counsel, Ottawa

AWARD OF THE ARBITRATOR

The narrow issue to be resolved is whether the provisions of the Employment Security and Income Maintenance Plan are available to the grievor, in his capacity as an employee holding a temporary position. At the time of the implementation of the Track Force Mechanization project, Mr. Scott held a temporary track maintainer's position in New Brunswick.

It appears that between February 16 and April 16, 1990 and from March 23 to April 23, 1991, during which time Mr. Scott was unable to hold any position, he was treated by the Company as being fully entitled to employment security protection. The Company maintains that payments made to him at that time were made in error. When he was again unable to hold work effective January 3, 1992, the Company declined to treat Mr. Scott as an employee entitled to employment security, solely on the basis that he held a temporary position at the time of the implementation of the track force mechanization program. It is common ground that the grievor possessed more than eight years of cumulative compensated service prior to the implementation of the operational and organizational change of the track forces mechanization program in 1989.

The following provisions of the Employment Security and Income Maintenance Plan are pertinent to the resolution of this grievance:

- 7.1** Subject to the provisions of this Article, and in the application of Article 8.1 of The Plan, an employee will have Employment Security when he has completed 8 years of Cumulative Compensated Service with the Company. An employee on laid-off status on June 18, 1985 will not be entitled to Employment Security under the provisions of this Article until recalled to service.
- 7.2** An employee who has Employment Security under the provisions of this Article will not be subjected to layoff as the result of a change introduced through the application of Article 8.1 of The Plan.
- 7.3** An employee who has Employment Security under the provisions of this Article and who is affected by the notice of change issued pursuant to Article 8.1 of The Plan, will be required to exercise his maximum seniority right(s), e.g., location, area and region, in accordance with the terms of the collective agreement applicable to the employee who has Employment Security.

Further, the definition provisions of the ESIMP are instructive. They read, in part, as follows:

- (a)** "Employment Security" means that an employee who has completed 8 years of Cumulative Compensated Service with the Company will have Employment Security as provided in Article 7.

Article 37.1 of the collective agreement (Agreement 10.1) specifically refers to the entitlement of employees to the protections of the ESIMP. It provides as follows:

- 37.1** The provisions of the Employment Security and Income Maintenance Plan dated April 21, 1989 will apply to employees covered by this Agreement

The position of the Company is that the protections of employment security are intended to attach only to employees who hold permanent positions at the time of notice under article 8 of the ESIMP. The Arbitrator has considerable difficulty with that submission. The ESIMP is an elaborate agreement negotiated between parties sophisticated in the ways of collective bargaining. The text of the agreement itself reflects that some thought was given to the categories of employees who would be excluded from its protection. In this regard it is significant to note that article 11 specifically identifies and excludes casual and part-time employees from the provisions of the plan. It reads, in part, as follows:

- 11.1** Casual and part time employees are those who work casually on an as-required basis from day to day, including those who work part days as distinguished from employees who work regular or regular seasonal positions.
- 11.2** Casual and part time employees are entirely excluded from the provisions of The Plan.

Additionally, the agreement reflects the parties' understanding that seasonal employees, a classification which would include persons whose employment relationship would be more tenuous than that of many employees holding temporary positions, are covered by the terms of the ESIMP. In this regard, article 10 of the plan provides as follows:

- 10.1** Seasonal employees are defined as those who are employed regularly by the Company but who normally only work for the Company during certain seasons of the year. Articles 4 and 8 of The Plan shall apply to these employees except that payment may not be claimed by any seasonal employee during or in respect of any period or part of a period of layoff falling within the recognized seasonal layoff period for such group. In respect of seasonal employees laid off during working period, the seven and thirty-day waiting periods provided for in Articles 4.4(i)(b) and 4.4(i)(c) will apply, except that in the case of a seasonal employee who is not recalled to work at the commencement of the recognized seasonal working period, the seven or thirty-day waiting period, as the case may be, will begin on the commencement date of the recognized seasonal working period. Seasonal employees and recognized seasonal working periods shall be as defined in Memoranda of Agreement signed between the Company and the affected Organizations signatory thereto.

There is no language found in the ESIMP which would indicate any agreement of the parties to exclude employees holding temporary positions from its protection, where such employees have the requisite amount of cumulative compensated service. Further, as argued by counsel for the Brotherhood, the questions and answers appended to the ESIMP booklet, which are not themselves negotiated terms, but are intended to assist the employees in understanding how the agreement operates, support the view advanced by the Brotherhood. Question number 7 purports to answer the question "When can I not claim benefits?". Some twelve categories of circumstances are then listed, describing employees who are not entitled to benefits including, for example, persons who are on leaves of absence, employees held out of service for disciplinary reasons, seasonal employees during a recognized period of seasonal layoff, retirees and persons impacted by a reduction or stoppage of work due to a strike. Nowhere in the list, which by its nature appears to be exhaustive, is there any exemption of entitlement for employees holding temporary positions.

Question and answer numbers 62 and 63 read as follows:

- #62** What happens if I cannot hold a position with the Company and I have Employment Security?

You will continue to be paid the basic rate of your former position until such time that you can be placed on an unfilled vacancy.

- #63** What is my former position?

The last permanent or temporary position to which you were the successful applicant.

In the Arbitrator's view the above answers are compelling evidence that the Company had the same understanding as the Brotherhood, namely that temporary employees are covered by the employment security provisions of the Employment Security and Income Maintenance Plan.

The Company further suggests that past practice confirms its view that employees holding temporary positions were not intended to be protected by employment security. In this regard it stresses that the positions identified for abolishment in respect of article 8 notices under the ESIMP are, as a matter of general practice, permanent positions. In the Arbitrator's view that fact does not, of itself, sustain the position advanced by the employer. The positions which the Company chooses to abolish are within its discretion, having regard to the changes being implemented. That determination is not particularly instructive as to the understanding of the parties with respect to the protections to be afforded to employees in the event of displacements. Moreover, having regard to the fact that the concept of employment security has apparently existed between the parties for a relatively short number of years, having originated in 1985, this is not an issue which can be resolved by reference to long standing practice. I am satisfied that it is the terms of the collective agreement, and of the ESIMP, which must prevail in the circumstances of this case.

The language of the ESIMP is barren of any indication that the parties intended that employees holding temporary positions and who have the requisite cumulative compensated service would not be entitled to the protection of employment security. The parties specifically excluded casual and part time employees from the protections of the plan, and separately addressed the entitlement of seasonal employees. In these circumstances, the more compelling conclusion is that by making no distinction as between employees who hold permanent or temporary positions, the parties to the ESIMP did not intend to exclude employees holding temporary positions who would otherwise be eligible.

The above conclusion is further supportable on a purposive analysis. It is common ground that employees holding temporary positions may do so for extensive periods of the year, often exceeding the duration of the annual employment of seasonal employees, and in some cases being virtually continuous. On what basis can it be concluded that the parties would have intended to give the protections of employment security to seasonal employees, as provided in article 10 of the ESIMP, while depriving long service employees who hold temporary positions from the same protection? The Arbitrator can see none, and can see nothing in the language or overall scheme of the ESIMP to support the conclusion advanced by the Company. On the contrary, as evidenced by the questions and answers appended to the ESIMP, which were prepared by the Company, the evidence suggests emphatically that the parties did mutually intend the protections of employment security to extend to employees holding temporary positions who are negatively impacted by a technological, operational or organizational change which is the subject of a notice under article 8.1 of the Employment Security and Income Maintenance Plan.

For the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the Company's position with respect to the eligibility of the grievor for employment security is contrary to the terms of the ESIMP. The Arbitrator directs that the grievor be permitted forthwith to exercise his consolidated seniority, and that he be compensated for all wages and benefits lost. For the purposes of clarity, and as it may bear on remedy, the Arbitrator notes the representations of the Brotherhood at the hearing with respect to the fact that the wage entitlement of an employee holding a temporary position, when on employment security, is to be calculated on a rateable basis, having regard to his or her normal periods of employment.

14 January 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR