CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2514

Heard in Montreal, Thursday, 14 July 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

EX PARTE

DISPUTE:

Claims for violation of Appendix 2 including Clauses 1, 3 and 6 of the Memorandum of Agreement known as the Conductor Only Agreement for failure to advertise unused early retirement opportunities (pension credits) at each home terminal at regular intervals.

COUNCIL'S STATEMENT OF ISSUE:

The Company has taken the position that it is not obliged to offer unused early retirement opportunities at home terminals at regular intervals unless there are surplus employees at the home terminal in question at the time retirement opportunities are to be issued (change of card). Accordingly, no unused credit opportunities will be available at said location.

The Union takes the position that the Company is obliged to advertise and offer unused early retirement opportunities to the eligible employees at each home terminal at regular intervals (change of card) based on those credits promised to the Union in accordance with the number of surplus employees at each terminal as calculated at the time this Appendix became effective (September 1991).

The Union claims a violation of Appendix 2, (Clauses 1,3 and 6) of the Conductor Only Agreement. The Union further relies upon the negotiations, history and representations made to the Union and its membership by the Company during the Conductor Only Agreement explanation and ratification process.

The Company has denied the grievance, maintaining that credits would only be made available at appropriate intervals, dependent upon whether or not any credits existed at the location in question, and provided that a surplus of employees existed at this location at the time the credits were to be advertised.

FOR THE COUNCIL :

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRMAN

There appeared on behalf of the Company:

K. Peel	– Counsel, Toronto
D. W. Coughlin	– Manager, Labour Relations, Montreal
A. E. Heft	– Manager, Labour Relations, Toronto
B. Hogan	– Manager, Crew Management Centre, Toronto
M. Fisher	– Director, Crew Management Centre, Atlantic Canada
J. B. Bart	–Manager, Labour Relations, Montreal

And on behalf of the Union :

D. J. Wray	– Counsel, Toronto
M. P. Gregotski	– General Chairperson, Fort Erie
W. G. Scarrow	– General Chairperson, Sarnia
R. Beatty	– Vice-General Chairperson, Hornepayne

AWARD OF THE ARBITRATOR

The Conductor Only Agreement was entered into by the parties on the basis of a memorandum of agreement dated July 12, 1991. The agreement contains a number of substantial gains and protections for the Union's membership, including such elements as conductor-only wage premiums, increases in certain rates of pay and the establishment of furlough boards. Central to the agreement is the stipulation that employees whose seniority date falls on or prior to June 29, 1990 are not to be laid off. The general mechanism for reducing the work force, and allowing a cost saving to the Company in the long term, is the promotion of attrition through particularly attractive separation packages. The agreement effectively established a number of retirement opportunities based on the number of non-essential brakepersons, augmented by 25% of that number to cover spare and relief employees. This resulted in the establishment of some 270 retirement opportunities. The issue concerns the periodic availability of those opportunities, until such time as they are exhausted.

The following provisions of Appendix 2 of the Conductor Only Agreement are material to the dispute before the Arbitrator:

APPENDIX 2

EARLY RETIREMENT OPPORTUNITIES

(1) The parties recognize that the implementation of a conductor only crew consist in the manner set out in the Memorandum of Agreement signed in Montreal, Quebec on July 12, 1991 will render a certain number of employees surplus. The parties also recognize that the number of surplus employees will be reduced over time by means of attrition. **Therefore, in order to accelerate the attrition of surplus employees, a number of early retirement opportunities will be made available at regular intervals equivalent to the number of surplus employees in the work force at the time. Such early retirement opportunities will be made available under the terms and conditions set out in this Appendix 2.**

(2) Protected employees who are eligible for early retirement under the CN Pension Plan(s) Rules and who have 85 points as defined by the Pension Plan(s) Rules may voluntarily elect to retire under the terms and conditions set out herein.

(3) The initial number of early retirement opportunities to be made available will equate to the number of surplus positions (existing brakemen's positions determined to be non-essential brakemen's positions in accordance with Clause 7 of the Memorandum of Agreement plus 25% of such positions).

(4) At each change of timetable or at such other intervals as may be agreed to by the parties, such early retirement opportunities will be made available, on a terminal by terminal basis, to protected employees working under Agreement 4.16. Except as provided by the NOTE to this paragraph (4), the total number of such early retirement opportunities to be made available will, in no case, exceed the remaining number of opportunities as calculated pursuant to paragraph (5).

NOTE: If, during the two (2) years immediately following the effective date of the aforementioned Memorandum of Agreement (i.e., up to and including September 27, 1993), the service design specifications of a train or trains, previously identified as requiring a brakeman, are revised so that such train or trains meet the criteria for operation with a crew consist of a conductor only, the total number of existing early retirement opportunities to be made available at the terminal will then be increased by one for each such train. For each four opportunities increased, an additional opportunity will be added.

(5) The number of early retirement opportunities will be reduced by one for each protected employee who is removed from the active working list (including employees who are removed from the working list as a result of accepting an early retirement opportunity) other than by discharge or promotion to yardmaster or locomotive engineer or an excepted position.

(6) Such early retirement opportunities will continue to be offered until exhausted in accordance with this Appendix.

…

> **(12)** In order to be eligible for an early retirement opportunity as set out herein at a particular terminal, a protected freight employee must have been assigned to that particular terminal for a period of at least two calendar years at the date the early retirement opportunities are awarded.
>
> (emphasis added)

The dispute before the Arbitrator arises because of the disagreement between the parties with respect to the availability of early retirement opportunities at each change of timetable, as contemplated in paragraph 4 of Appendix 2. The Company takes the position that retirement opportunities can be taken at any given terminal only to the extent that there are surplus employees at that location at the change of timetable. The Union maintains that the presence of surplus employees at a given terminal is not a prerequisite to the ability of the eligible employees to elect early retirement under the terms of the Conductor Only Agreement. It submits that so long as an employee meets the eligibility standards established in paragraph 2 of the Appendix he or she may elect to take an early retirement opportunity at a given terminal, if that terminal's quota of early retirement opportunities is not exhausted.

The Union submits that during the course of negotiations it was aware that some terminals, for example Toronto South and Hornepayne, often have difficulty filling assignments, and might be unlikely to have a surplus of employees. It submits that the course of negotiations, as well as the language ultimately agreed to, reflect an understanding that employees at a given terminal who are otherwise eligible would be entitled to take an early retirement opportunity at the change of timetable, regardless of whether there were any surplus employees in that particular terminal at the time. It submits that that is evident from the Union's rejection of the initial proposals made by the Company as well as the indications given by Company representatives at a meeting held in Oakville, Ontario on June 26 and 27, 1991, when the terms of the agreement were explained to the General Committees of Adjustment prior to ratification of the agreement. The Union submits that on the basis of the exchange of positions at the bargaining table, and the communications at the meeting in Oakville the Company is estopped from asserting the interpretation of Appendix 2 which it now seeks to rely on.

With respect, the evidence placed before the Arbitrator does not confirm any representation made by Company representatives regarding the availability of early retirement opportunities at future changes of timetable, during the course of the meeting in Oakville. It appears that the morning session involved the Company representatives, as well as Union representatives, generally reviewing and answering questions about the content of the draft agreement. The afternoon was a closed session of the Union's local chairpersons. The notes and verbal evidence presented by both parties do not reflect any direct discussion of the issue of whether retirement opportunities at a given terminal would be preconditioned on there being surplus employees in that location at the time in question. Indeed, it does not appear disputed that the first discussion of that issue between representatives of the parties came only after the ratification of the Memorandum of Agreement, in Windsor, during the course of a tour of Company terminals involving both union and management representatives to explain the workings of the Conductor Only Agreement.

Can it be said that there is a basis for estoppel in the evidence before the Arbitrator? It is not disputed that if the Company had made representations to the Union, during the course of bargaining, to the effect that enhanced retirement opportunities would be made available, on a terminal by terminal basis, at the change of timetable regardless of whether there were surplus employees at a given terminal, and the Union relied on those representations to enter into the agreement, the elements of an estoppel would be disclosed. Similarly, if, during the course of bargaining, the Union had expressed to the Company its understanding that the presence of surplus positions at a given terminal would not be a prerequisite to the right of eligible employees to elect to use an early retirement opportunity, and the Company's representatives said nothing in the face of such a statement, the elements of an estoppel might also be established (**Hallmark Containers Ltd.** (1983), 8 L.A.C. (3d) 117 (Burkett)). Upon a thorough review of the evidence, however, the Arbitrator cannot find that there was any representation made by representatives of the Company which would have induced the Union's representatives to believe that early retirement opportunities at the change of timetable would not be tied to the presence of surplus employees in a given terminal. Nor does the evidence disclose any statement by Union representatives to the employer, either during the course of bargaining or at the presentation meeting held in Oakville, which would have communicated to the Company the Union's belief that the presence of surplus employees in a terminal would be immaterial to the right of eligible employees to elect to use an early retirement opportunity. If there was any difference in the understanding of the parties with respect to this issue, no clear recognition of it emerged until the discussion of the requirement of surplus employees between representatives of both parties at Windsor, well after the execution and ratification of the Memorandum of Agreement.

Nor can the Arbitrator find in the exchange of positions over the course of bargaining for the Conductor Only Agreement the equivalent of such representations as would ground an estoppel. While it is clear that the Union rejected a number of formulas initially proposed by the Company with respect to the Conductor Only Agreement, nothing specific was said by the Union's representatives with respect to the availability of early retirement opportunities at changes of timetable in locations where there are no surplus employees. The offers initially put forward by the Company contained a number of elements, and, whatever may have motivated the Union, the wholesale rejection of the Company's proposals by the Union could not, of itself, be taken as a clear statement on the part of the Union with respect to the conditions which would make early retirement opportunities available, on a terminal by terminal basis, in the future.

In the result, the issue falls to be determined on the language of Appendix 2 of the Conductor Only Agreement. In this regard, in the Arbitrator's opinion, the language of paragraph 1 particularly instructive. As that provision clearly indicates, the first and most obvious consequence of the Conductor Only Agreement is to render a number of employees surplus. It is in that context that the parties expressly agree to make early retirement opportunities available at predetermined times in the future. The expressed purpose of that arrangement is, in the words of paragraph 1, "… in order to accelerate the attrition of surplus employees …". The provision goes on to state that the number of early retirement opportunities to be made available are to be "… equivalent to the number of surplus employees in the work force **at the time**." (emphasis added)

The Union's counsel submits that the phrase "at the time" found in the foregoing portion of paragraph 1 refers to the time at which the memorandum of agreement was made, namely July 12, 1991. The Arbitrator finds that to be a strained and unnatural construction of the words used by the parties. It is axiomatic that in the interpretation of collective agreements arbitrators are to give words their normal grammatical meaning, in accordance with the generally established usage of language. While it is true that the phrase "at the time" can be used to refer to events either in the future or in the past, regard must be had to the context in which the phrase is used to understand which is intended. In paragraph 1 of Appendix 2 of the memorandum of agreement the phrase "at the time" appears at the end of a sentence which explains that opportunities "will be made available at regular intervals". Clearly, the focus of the sentence is on the future, when early retirement opportunities are to be made available. The Arbitrator is satisfied that a plain reading of the provision amply reflects the understanding of the agreement that the availability of early retirement opportunities, established on a terminal by terminal basis at each change of timetable, in accordance with paragraph 4, is to equate to the number of surplus employees at the time of the change of timetable in question. It is also evident, when paragraphs 1 and 4 are read together, that the agreement refers to the number of surplus employees within a given terminal.

The foregoing interpretation of the language of Appendix 2 is, further, supported by a purposive approach to the agreement made by the parties. An obvious consequence of the Conductor Only Agreement is the creation of a substantial number of surplus employees. In light of the agreement protecting employees against layoff, the parties saw an obvious need to establish a mechanism to accelerate the reduction of the surplus ranks. It is for that purpose, and for that purpose only, that the early retirement opportunities, limited in number to coincide with the number of surplus employees in the system, are to be offered. While it is true that the number of surplus employees will be reduced by other forms of attrition, such as death and normal retirement, the parties agreed on a formula to accelerate attrition by a provision plainly intended to reduce the cost which would otherwise be incurred by the Company under the Conductor Only Agreement over the long term.

If the interpretation advanced by the Union is correct, however, early retirement opportunities could be taken up in substantial numbers without any improvement in the attrition of surplus employees. Indeed, as Counsel for the Company notes, in some locations the employer would be required to hire new employees to replace non-surplus individuals electing to take early retirement, in a manner that would substantially increase the costs to the Company, without any gains being made in respect of attrition. The concept of attriting the ranks of employees made surplus by special agreements which reduce the complement of train crews is not new to the parties. In prior agreements, such as the Crew Consist Agreement, attrition was expressly recognized as the appropriate mechanism for the elimination of surplus positions. That is amply reflected in the award of the arbitrator in the Crew Consist Agreement arbitration, dated July 17, 1990, between these same parties. Indeed, the elimination of non-essential positions by attrition dates back to the earliest agreements between the parties allowing for the operation of reduced yard crews in the late 1960s.

It would, of course, have been possible for the parties to fashion an agreement whereby the Company would be obligated to offer enhanced early retirement opportunities to employees, at regular intervals, even though doing so would not promote the elimination of surplus positions by attrition, and would require the recruitment of new hires.

It is, however, difficult to imagine the employer making such a bargain, to the extent that it would undermine, if not entirely defeat, the very purpose of the agreement. It would, in the Arbitrator's view, require clear and unequivocal language to confirm that the parties would have intended a result so contradictory to the purpose of their agreement. In the case before me the language of paragraph 1 is, for the reasons related above, clear in its intention. It sates that the availability of early retirement opportunities at future intervals is agreed upon for the purpose of accelerating the attrition of surplus employees. Additionally, as noted above, the number of such opportunities is to be equivalent to the number of surplus employees, calculated on a terminal by terminal basis, at the interval in question. The Arbitrator is satisfied that the interpretation advanced by the Company is consistent with the language of Appendix 2 of the Conductor Only Agreement, and in particular with the mechanism for offering early retirement opportunities contemplated in paragraphs 1 and 4 of Appendix 2 of the Agreement.

For the foregoing reasons no violation of the Conductor Only Agreement is disclosed, and the grievance must be dismissed.

August 14, 1994

(signed) MICHEL G. PICHER
ARBITRATOR