CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2535

Heard in Montreal, Thursday, 13 October 1994

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

The Company's position with respect to how employees on employment security (ES) status are required to fill positions.

JOINT STATEMENT OF ISSUE:

In April of 1993, the Company introduced its Basic Track Maintenance Force initiative through the medium of an Article 8 notice. As a result of this change, some employees, after exercising their maximum seniority rights pursuant to the Job Security Agreement (JSA), were placed on employment security status. The Brotherhood disagrees with some aspects of the Company's position, dealing with the extent to which such employees are required to fill available vacancies.

The Brotherhood contends: **1.)** That ES status employees are required to fill permanent vacancies on their Basic Seniority Territories (BST) only if their seniority so permits; **2.)** That ES status employees are not required to fill permanent vacancies off their BST; **3.)** That ES status employees are required to fill temporary positions of more than 45 days on their BST only if their seniority so permits; **4.)** That ES status employees are not required to fill temporary positions off their BST; and **5.)** The Company's position in this regard is in violation of articles 7.3A(a), 7.4 and 7.12 of the JSA.

The Brotherhood requests: That it be ordered that the Company's position is in violation of the Job Security Agreement and that it be ordered that any and all employees adversely affected be compensated for any and all losses incurred as a result thereof.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. KRUK	(SGD.) D. T. COOKE
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: GENERAL MANAGERS

There appeared on behalf of the Company:

D. T. Cooke	– Manager, Labour Relations, Montreal
S. J. Samoniski	– Director, Industrial Relations, Montreal
R. A. deMontignac	– Manager, Benefits Plan, Montreal
D. E. Guerin	– Assistant Labour Relations Officer, Montreal
D. L. Johnson	– Benefits Plan Officer, Montreal

And on behalf of the Brotherhood:

D. Brown	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
K. M. Deptuck	– National Vice-President, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

At the hearing of this grievance it became evident that certain of the matters reflected as disputed in the joint statement of issue are in fact not contentious. There is no dispute between the parties with respect to the treatment of ES status employees in regards to filling permanent or temporary positions on their Basic Seniority Territories. In the result, the contentions 1) and 3) of the Brotherhood appearing in the joint statement of issue need not be resolved. The sole issue before me, therefore, is whether the Company is correct in its treatment of ES status employees who are required to fill permanent or temporary positions off their Basic Seniority Territory, within their Region.

The position of the Company can be summarized as follows. With respect to permanent vacancies, an employee with employment security status is required to fill a permanent vacancy on his or her Basic Seniority Territory, that is to say on the Region, if the vacancy in question would otherwise be filled by an employee with less than eight years' cumulative compensated service, that is an employee who does not have employment security status. An employee will also be required to take a temporary vacancy of forty-five days or more where such vacancy arises off the employee's Basic Seniority Territory, within the Region if the vacancy is unfilled by employees from the Basic Seniority Territory in question. The Company undertakes that reasonable expenses will apply in such a case. Lastly, in respect of temporary assignments under forty-five days, the Company maintains that an employee on employment security status may be called to an assignment on another Basic Seniority Territory, within the Region, if there are no employment security status or laid off employees available on that Basic Seniority Territory, again subject to the paying of reasonable expenses.

The Brotherhood submits that the position of the Company is not supported by the language of the Job Security Agreement, or of the collective agreement, as regards the exercise of an employee's seniority. Central to the dispute between the parties is the operation of article 7.3A(a) of the Job Security Agreement which provides as follows:

> **7.3A (a)** An employee who has employment security under the provisions of this article and who is affected by a notice of change issued pursuant to article 8.1 of the Job Security Agreement, 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.
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> **7.3A (b)** An employee who has employment security under the provisions of this article and is unable to hold a position on his seniority district, e.g. at the location, area and region will be required to exercise the following options provided he is qualified or can be qualified in a reasonable period of time to fill the position involved. In filling vacancies, an employee who has employment security must exhaust such available options, initially on a local basis, then on his seniority district:
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> > **(1)** fill an unfilled permanent vacancy within the jurisdiction of another seniority group and the same collective agreement;
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> > **(2)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group within another collective agreement and the same Union;
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> > **(3)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group and another union. (For the purpose of this article 7.3A(b)(3), another union is defined as the BMWE, TCU or CSC System Council No. 11 of the IBEW).
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> > **(4)** there being none, fill an unfilled permanent vacancy in a position which is not covered by a collective agreement.
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> > **NOTE:** In the application of article 7.3A(b)(4) and notwithstanding the provisions of any collective agreement to the contrary, an employee who has employment security while employed on a position which is not covered by a collective agreement will remain, and continue to accumulate seniority, on the list from which transferred. (See Appendix E for BMWE) (See Appendix G for TCU)

The Brotherhood argues, in part, that the obligation of an employee on ES status to exercise his or her maximum seniority rights, as contemplated under article 7.3A(a) is not a continuous obligation, but rather that it

triggers only when certain events occur. Such events would include the initial article 8 notice under the Job Security Agreement, or, for example, the return to ES status following the completion of a temporary vacancy or the return of an employee to ES status following the completion of a work assignment outside the bargaining unit. The latter would arise under the terms of article 7.12 of the Job Security Agreement which provides as follows:

> **7.12** An employee on employment security called to work outside his bargaining unit will revert to employment security status at the termination of such work, provided he has exercised his obligations to hold work pursuant to the employment security rules. Additionally, when an employee is recalled to work within his/her own seniority classification and where the nature of that work is that it is expected to be of a defined term or a special project of any kind then, at the termination of such work, provided he has exercised his obligations to work pursuant to the employment security rules he will revert to employment security status.

The Brotherhood's argues that the exercise of maximum seniority rights for the purposes of article 7.3A(a) of the Job Security Agreement must be triggered by a particular event in the life of the employee with employment security status, such as the recall to a vacant position. Its Counsel submits that when such a recall occurs, the Company remains under the obligation to fill positions in a manner consistent with the seniority provisions of the collective agreement. In the Brotherhood's view, the obligation to exercise seniority must be tied to the specific circumstances for such exercise as are found in the collective agreement or the Job Security Agreement.

The Company relies, in part, on the provisions of article 7.10 of the Job Security Agreement which are as follows:

> **7.10** An employee with employment security who has exhausted maximum seniority at his home location may displace in keeping with his seniority elsewhere on his Basic or Employment Security seniority territory pursuant to the provisions of the applicable collective agreement. However, such employee will not be required to displace beyond his home location if this would result in a junior employee being placed on employment security status. An employee exercising this option will not forfeit employment security providing he otherwise maintains eligibility.

The Company submits that the reference to an employee's "Employment Security seniority territory" as distinct from an employee's Basic Seniority Territory, in the foregoing provision, is instructive as to the intention of the parties. It argues that the provision is an implicit recognition that an employee who has employment security status has an unqualified obligation to displace beyond his or her Basic Seniority Territory, onto the Region, save that such a displacement would not be required if it simply results in another employee being placed on employment security status.

The core issue before the Arbitrator is whether the mandatory exercise of seniority found under article 7.3A(a) of the Job Security Agreement is, as the Company contends, an ongoing obligation for an employee who has the benefit of ES status or whether, as the Brotherhood contends, that obligation arises only when certain triggering events occur, and does not extend to requiring an employee to displace beyond his or her Basic Seniority Territory.

Upon a careful review of the terms of the Job Security Agreement, and its history, the Arbitrator has difficulty with the position advanced by the Brotherhood. Firstly, the Brotherhood offers no compelling explanation for the reference, within article 7.10 of the Job Security Agreement, to the words "Employment Security seniority territory". Nor does it deal convincingly with the use of the word "region" expressly found within article 7.3A(a) of the Job Security Agreement. The Arbitrator does not find persuasive the suggestion that the language of that provision was intended to require an obligation to protect work on a regional basis only if the terms of the collective agreement contemplate the displacement to such work. In my view the more reasonable interpretation is that the parties were explicit as to the ambit of the displacement obligation, being in the location, area and region. The reference to the terms of the collective agreement is, in the Arbitrator's view, intended to incorporate the procedures to be followed, and the relative seniority rights as they are defined within the collective agreement.

Prior arbitration awards have given considerable consideration to the meaning and operation of employment security provisions found in job security agreements and employment security and income maintenance plans within the railway industry in Canada. It may be noted that while the language of the provisions considered in prior cases varies slightly, with certain qualifications not here material, the fundamental scheme of employment security, and the obligation to protect employment in exchange for the benefits of employment security are essentially the same. In **CROA 2074**, which involved a dispute between VIA and the CBRT&GW the following comments appear:

> … The Brotherhood's spokesperson submits that no vacancy can be considered available until all of the bulletining procedures under the terms of the Collective Agreement have been exhausted. In the result, therefore, in a given region a vacancy could be filled in accordance with the terms of the Collective Agreement by a junior laid off employee, with the result that a senior employee on employment security status, who is without any assignment and who remains on full salary and benefits, remains idle. That, however, is inconsistent with the established terms of the Supplemental Agreement, whereby employees who enjoy employment security status must opt to exercise their full seniority to protect that status, failing which they are subject to layoff. In the Arbitrator's view it would require clear and unequivocal language to establish that in the terms of Paragraph 8 the parties intended to depart so radically from the general principles governing the concept of employment security reflected in the terms of Article 7 of the Supplemental Agreement, the document which is the cornerstone of employment security. In my view the provisions of that paragraph are to be read harmoniously with the terms of the Supplemental Agreement as well as the terms of Article 12 of the Collective Agreement. Clearly, Paragraph 8 intends a procedure additional to and superceding the provisions of Article 12 of the Collective Agreement. That, in my view, is the conclusion most compellingly to be drawn from the language of Paragraph 8 of the Memorandum of Agreement, as well as from the overarching context of all of the above documents.
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> There is, moreover, a purposive dimension which casts serious doubt on the position advanced by the Brotherhood. According to the argument advanced by its representative, the intention of the Memorandum of Agreement is that employees on employment security would be compelled to exercise their seniority to claim positions system wide, thereby displacing other employees, only on a one-time basis, in the General Bid of December 4, 1989. That view, however, is not supported by the language of Paragraph 8. The establishment of a system list for the filling of vacancies by employment security employees suggests a different intention. Paragraph 8 does modify the provisions of Article 7 of the Supplemental Agreement, to the extent that employment security employees are first to be called from the region where the vacancy exists, before any are called from elsewhere in the system, and are to be called in reverse seniority.
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> However, the general principle that vacancies are to be covered by employees who have the protections of employment security does not change. No violence is done to the Collective Agreement to the extent that the Corporation concedes that no vacancy can be filled by an employee on employment security if there is another qualified employee with greater seniority who could claim the vacancy by the normal operation of Article 12 of the Collective Agreement.

The issue of maximizing the utilization of employees on employment security status arose in **CROA 2430**, a dispute between the Canadian National Railway Company and the CBRT&GW concerning the filling of newly established positions at Moncton. The Arbitrator sustained the Company's position that such work should first be offered employees on employment security status at that location commenting, in part, as follows:

> In the Arbitrator's view it is important to have recourse to first principles in resolving so difficult a conflict. The Employment Security and Income Maintenance Agreement itself recognizes the importance of the protection of employment security, which attaches to persons who have completed eight years of cumulative compensated service with the Company. The rights accorded to such individuals under articles 7 and 8 of the Employment Security and Income Maintenance Agreement are a recognition of that fact. Commensurate with the extraordinary protection of employment security accorded to senior employees under the agreement, however, is the obligation of employees with such benefits and protections to make themselves available to protect the highest rated available work which their qualifications and seniority will allow. In other words, the spirit of the agreement under which this Arbitration Board is constituted reflects an understanding among the signatories to the agreement that, on the one hand, employees with a substantial degree of service to the Company will receive full protection against lay off while, on the other hand, the Company can expect a corresponding duty on the part of such protected persons to involve themselves in active service at the first opportunity.

In an arbitration between the CBRT&GW and VIA Rail Canada concerning the implementation of cuts in service effective January 15, 1990 (*Ad Hoc decision 264 dated November 27, 1989*), the following comments appear:

> In the Arbitrator's view article 7.5 sheds substantial light on the issue at hand. It expressly reflects the agreement of the parties that an employee who enjoys employment security is compelled to exercise his or her seniority to retain that status. The employee is not required to do so. However, should he or she choose, for example, not to bump onto a position at another location, the employee forfeits employment security but remains "eligible to take layoff" under the terms of the collective agreement as well as the Supplemental Agreement. There is, in other words, a status distinction drawn between layoff, and the entitlement to layoff benefits, on the one hand, and the preservation of employment security status on the other hand within the terms of the Supplemental Agreement itself. By its own terms, the Supplemental Agreement differentiates the employee who is laid off in the fallout of an operational or organizational change from the employee who retains employment security.
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> It is, to say the least, counterintuitive to view a person who retains the right to his or her full salary and benefits, including annually negotiated increments and improvements, until retirement, and for whom union dues continue to be deducted, as an employee on layoff within any generally accepted understanding of that term. While the employee may be described as inactive or on call with full pay, that status is to be distinguished from the less fortunate fate of one who is laid off and who, subject to recall rights, generally faces the inexorable dwindling and eventual extinguishment of all monetary benefits. It is clear to the Arbitrator, both on the basis of these general considerations, and the specific provisions of the Supplemental Agreement that there is a distinction between employment security status and layoff status for the purposes of the Supplemental Agreement of the parties.

The position argued by the Brotherhood in the case at hand effectively places the employee on employment security status in a position analogous to that of a laid off employee whose obligations to exercise seniority will only trigger, for example, upon a recall to a temporary vacancy, and the completion of the work of that vacancy. In my view, that argument misconceives the unique obligations which, by the agreement of the parties, were intended to attach to an employee who, by virtue of the extraordinary protections of employment security, remains immune from layoff and retains full wages and benefits. I can see no basis upon which to conclude other than that the parties in the case at hand, like those in the cases reviewed above, accepted as an implicit part of the bargain which created employment security that a person so protected must fill positions which would otherwise be filled by junior unprotected employees. In light of the language of articles 7.3A(a) and 7.10 of the Job Security Agreement that obligation extends to the Regional level.

If the interpretation advanced by the Brotherhood is accepted there are substantial questions as to whether the Job Security Agreement achieves the purpose for which it was established, or operates in harmony with the fundamental bargain which underlies the agreement. As noted, that bargain is that senior employees enjoy immunity from layoff subject to an obligation to protect work, within an agreed geographic area, by the exercise of their maximum seniority rights. If the Brotherhood's view should prevail, it does not appear disputed that employees on employment security status within a given Basic Seniority Territory may remain at home idle, receiving full wages and benefits, while vacant positions are filled in an adjoining Basic Seniority Territory, within the same region, by junior employees or new hires. With respect, that is not the understanding which the parties achieved in the negotiation of the extraordinary protections of the Job Security Agreement and the commensurate obligations of employees with employment security status to protect work, as contemplated within article 7.3A(a) of the Job Security Agreement. It would, in the Arbitrator's view, require clear and unequivocal language within the terms of that agreement, which is far more specific in respect of these matters than the general language of the collective agreement, to conclude that the parties had intended any other understanding. That conclusion, moreover, is supported by testimony respecting the workings of employment security given previously by the Brotherhood's former System Federation General Chairman before Arbitrator Dalton Larson, during the course of hearings on December 18, 1987. Significantly, it is also reflected in the practice which has been accepted by other unions signatory to the Job Security Agreement.

In the result the Arbitrator can find in the position of the Company no violation of article 7.3A(a) of the Job Security Agreement. Nor can I sustain the allegation that the Company has violated article 7.4 and article 7.12 of that agreement, as alleged in the joint statement of issue.

For the foregoing reasons the grievance must be dismissed.

October 14, 1994

(signed) MICHEL G. PICHER
ARBITRATOR