CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2563

Heard in Montreal, Wednesday, 14 December 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE – BROTHERHOOD:

The extent of the obligation of employees with employment security (ES) covered by supplemental agreements 10.8 and 10.9 to exercise beyond their Basic Seniority Territories (i.e., onto the region) when adversely affected by an article 8 notice issued pursuant to the Employment Security and Income Maintenance Agreement (ESIMA).

BROTHERHOOD'S STATEMENT OF ISSUE:

Since late June 1994, a dispute has existed between the parties with respect to the obligations of ES employees to exercise their seniority onto the region in article 8 situations. The Company's current position is set out in a letter dated December 9, 1994 and provides that such employees, after the exercise of seniority pursuant to article 4.1 of agreements 10.8 and 10.9:

> **(A)** ***may*** choose to exercise onto the region in accordance with article 4.2 of agreements 10.8 and 10.9;
>
> **(B)** If they choose not to exercise under (A) and wish to protect their ES, they ***must*** exercise their seniority onto the region in accordance with article 7.3(a) of the ESIMP; and
>
> **(C)** If they cannot hold any position under (B), then they ***must*** exercise consolidated seniority pursuant to Appendix 'G' of the ESIMP.

The Union contends that: **1)** That all employees covered by agreements 10.8 and 10.9 who are adversely affected by an article 8 change must fulfill their seniority obligations in accordance with article 4.1 of agreements 10.8 and 10.9; **2)** That article 4.2 of agreements 10.8 and 10.9 has no application to ES employees in article 8 situations; **3)** That article 7.3(a) of the ESIMP does not create any obligation for ES employees to exercise their seniority in any manner except that which is specifically provided for in agreement 10.1 and supplementals thereto (i.e., that article 7.3(a) creates no obligation for employees to exercise onto the region that is independent of the provisions of the collective agreement); **4)** That ES employees, after exhausting article 4.1 of agreements 10.8 and 10.9, must only, if possible, exercise their consolidated seniority pursuant to Appendix 'G' of the ESIMP; and **5)** That the Company's position is in violation of article 4 of agreements 10.8 and 10.9 and article 7, 8 and Appendix 'G' of the ESIMP.

The Union requests that: **1)** That the Arbitrator declare: **(a)** that article 4.2 of agreements 10.8 and 10.9 has no application in article 8 situations; **(b)** that article 7.3(a) of the ESIMP provides no obligation for employees to exercise their regular seniority onto the region (i.e., in any manner not in strict conformity with the terms of the collective agreement); and **(c)** that employees in article 8 situations, after exhausting article 4.1 of agreements 10.8 and 10.9, must immediately exercise consolidated seniority if possible. **2)** That the Arbitrator order compensation for any and all employees who have been adversely affected by the Company's interpretation for all losses of any kind

incurred as a result of this matter; that all employees who have relocated be returned with full expenses; and that any employee who has been laid off or displaced be returned forthwith to his prior position.

The Company denies the Union's contentions and declines the Union's request.

DISPUTE – COMPANY:

The maximum geographic territory in which an employee is required to exercise seniority under article 7.3(a) of the Employment Security and Income Maintenance Agreement.

COMPANY'S STATEMENT OF ISSUE:

It is the Company's position that article 7.3(a) of the Employment Security and Income Maintenance Agreement requires employees to exercise their maximum seniority on the region.

The Brotherhood's position as understood by the Company:

It is the Union's position that: **1)** Article 7.3(a) of the ESIMA provides no obligation for employees to exercise their regular seniority onto the region; and **2)** that employees in article 8 situations, after exhausting article 4.1 of agreement 10.8 and 10.9 must next only exercise consolidated seniority, if possible. **3)** The Union requests a declaration and that the Arbitrator order: compensation for employees who have been adversely affected by the Company's interpretation; that employees who have relocated be returned with full expenses; and that any employee who has been laid off or displaced be returned to his prior position.

FOR THE BROTHERHOOD:	**FOR THE COMPANY:**
(SGD.) R. A. BOWDEN	**(SGD.) A. E. HEFT**
SYSTEM FEDERATION GENERAL CHAIRMAN	**FOR: VICE-PRESIDENT, GREAT LAKES REGION**

There appeared on behalf of the Company:

J. Perron	– Counsel, Montreal
N. Dionne	– Manager, Labour Relations, Montreal
M. Hughes	– System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

D. Brown	– Senior Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa
G. Schneider	– Sysem Federation General Chairman, Winnipeg
P. Davidson	– Counsel, Ottawa
A. Trudel	– General Chairman, Montreal
C. McGuiness	– General Chairman, Moncton
R. Phillips	– General Chairman, Ontario
J. J. Kruk	– System Federation General Chairman, CP Lines, Ottawa
D. McCracken	– Federation General Chairman, CP Lines, Ottawa

At the hearing the parties agreed to an adjournment.

On Tuesday, 10 January 1995, there appeared on behalf of the Company:

J. Perron	– Counsel, Montreal
M. Gleason	– Attorney, Law Department, Montreal
N. Dionne	– Manager, Labour Relations, Montreal
W. Agnew	– Manager, Labour Relations, Moncton
D. C. St-Cyr	– Manager, Labour Relations, Montreal
M. Hughes	– System Labour Relations Officer, Montreal
J. Little	– Coordinator, Engineering, Montreal
D. Laurendeau	– Manager, Human Resources Development, Montreal

And on behalf of the Brotherhood:

D. Brown	– Senior Counsel, Ottawa

R. A. Bowden	– System Federation General Chairman, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg
P. Davidson	– Counsel, Ottawa
A. Trudel	– General Chairman, Montreal
C. McGuiness	– General Chairman, Moncton
R. Phillips	– General Chairman, Ontario

AWARD OF THE ARBITRATOR

The central issue in dispute concerns the ambit within which employees under collective agreements 10.8 and 10.9 must exercise their seniority as a condition of protecting their employment security. The Company takes the position that article 7.3(a) of the Employment Security and Income Maintenance Agreement (ESIMA) compels employees to exercise their maximum seniority on the region. The Brotherhood argues that employees are not compelled to exercise their seniority, for the purposes of the ESIMA, also referred to in the Brotherhood's *ex parte* statement as the "ESIMP", in any manner different than under the terms of collective agreement 10.1 and the supplemental agreements attached to it. Under certain supplemental collective agreements other than agreements 10.8 and 10.9, employees do have an obligation to exercise their seniority regionally. The dispute at hand concerns employees with employment security covered by supplemental agreements 10.8 and 10.9 which cover Track Maintenance and Bridge & Building employees, respectively.

It is common ground that under the terms of the collective agreement, in normal circumstances not relating to the application of the ESIMA, the possibility of employees exercising their seniority under collective agreements 10.8 and 10.9, to protect work on the region, is described in article 4.2 of each of those agreements. Displacement to the region is not mandatory but, rather, is optional to the employee. Article 4.2 of agreements 10.8 and 10.9 reads, in part, as follows:

> **4.2** An employee, who is laid off on account of reduction in staff, and who is unable, in the exercise of seniority, to displace a junior employee on his own seniority territory in accordance with article 4.1 ***may***, within thirty days, seniority permitting:
>
> **(a)** Displace the junior employee on the Region in the same seniority group from which laid off. An employee who elects to displace in accordance with the foregoing shall carry to the seniority territory to which he transfers only such seniority as he held in the classification from which he was laid off on his former seniority territory.
>
> OR
>
> **(b)** Elect to take layoff.
>
> (emphasis added)

In this grievance the Company takes the position that to protect his or her employment security status for the purposes of the ESIMA an employee is, by virtue of the conditions of article 7.3(a) of the ESIMA, under an obligation greater than is found in article 4.2, and is required to exercise seniority beyond his or her seniority territory, onto the region. In the Company's submission employees must first exercise their seniority in their own seniority territory, in their location and area, in accordance with article 4.1 of agreements 10.8 and 10.9 which provides as follows:

> **4.1** Except as otherwise provided in articles 3.4 and 3.8 an employee, in the event of a reduction in staff, unable to hold work in his own classification or group in his seniority territory shall, within ten (10) days, if qualified, displace a junior employee in the next lower classification or group in which he has established seniority. An employee failing to exercise his seniority within ten (10) days, unless prevented by illness or other cause for which bona fide leave of absence has been granted, shall forfeit his seniority under this Agreement.

Secondly, in the Company's view, employees may choose to exercise their seniority on their region pursuant to article 4.2, reproduced above. Thirdly, the Company submits that if an employee cannot or elects not to avail himself or herself of the article 4.2 option, they are compelled to exercise their seniority on the region, in accordance with article 7.3(a) of the ESIMA, following the same procedure as outlined in article 4.1 of agreements 10.8 and 10.9.

Finally, should none of the displacements described above be possible, the employee is required to exercise his or her consolidated seniority in accordance with Appendix G and articles 7.3(b) and 7.3(c) of the ESIMA.

The Company puts forward an alternative, second position. Under that submission it maintains that to protect their employment security status employees who are the subject of a technological, operational or organizational change notice duly given under article 8 of the ESIMA must first exercise their seniority in their own seniority territory, at their location and area, in accordance with article 4.1 of the supplemental agreements. Secondly, they must exercise their seniority on their region within the seniority group they previously occupied, in accordance with article 4.2 of the supplemental agreements. Finally, it submits, in respect of this alternative, that if none of the above displacements are possible the employee must exercise consolidated seniority in accordance with Appendix G and article 7.3(b) and (c) of the ESIMA. As can be seen, the only difference between the alternative positions advanced by the Company is that under the first formulation employees go through an optional exercise of seniority on their region under article 4.2 before going to a mandatory exercise of such seniority. There is little practical difference between the positions, as regards the effective outcome. In either case, in the Company's submission, an employee can ultimately be required to exercise his or her seniority to displace another employee or take a vacancy by the exercise of seniority on a regional basis.

Article 7.3 of the ESIMA provides as follows:

> **7.3 (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 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. (See Appendix 'F' for CBRT&GW, See Appendix 'G' for BMWE, See Appendix 'H' for RCTC)
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> **7.3 (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:
>
> **(i)** fill an unfilled permanent vacancy within the jurisdiction of another seniority group and the same collective agreement;
>
> **(ii)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group within another collective agreement and the same Union;
>
> **(iii)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group and another union signatory to the Employment Security and Income Maintenance Plan dated 21 April 1989.
>
> **(iv)** there being none, fill an unfilled permanent vacancy in a position which is not covered by a collective agreement.
>
> **Note:** In the application of Article 7.3(b)(iv) and notwithstanding the provisions of any collective agreement to the contrary, an employee who has Employment Security or 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.
>
> **7.3 (c)** An employee who has Employment Security under this Article and is unable to hold a position under Article 7.3(a) or (b) above will be required to fill an unfilled permanent vacancy on his "District" within the jurisdiction of the I.A.M., S.M.W.I.A., U.A.J.A.P.P.I., C.A.W.-Canada, I.B.E.W. (Council #34), or I.B.B., provided he is qualified or can become qualified within a reasonable period of time to fill the position involved.
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> **(i)** In the application of 7.3(c), "District" is defined as geographical area of the District currently in place at Canadian National Railways: Maritimes, Laurentian, Southern Ontario, Northern Ontario, Manitoba, Saskatchewan, Alberta, British Columbia North and British Columbia South.

(ii) In the event that there is an employee on Employment Security, represented by one of the organizations signatory to the ESIMP at the location where the vacancy exists, who has the suitability and adaptability to learn the duties of the position involved, no employee represented by his Bargaining Unit who is on Employment Security at another location on the District will be required to relocate.

(iii) In the event that an employee on Employment Security represented by one of the organizations signatory to the ESIMP fills an unfilled permanent vacancy under this Article 7.3(c), and such position is abolished within a period of one calendar year from the date the employee commences work under this Article 7.3(c), the employee will revert to Employment Security status, represented by his original bargaining unit at the location where the position is abolished.

7.3 (d) Subject to the provisions of Article 7.5 hereof, employees who have exhausted the options contained in paragraph (b) above and are placed on Employment Security status may fill, on a voluntary basis, permanent positions at their home location which are or will become part of any bargaining unit not signatory to The Plan provided they are qualified or can become qualified. Home location is defined as the Greater Metropolitan Area, e.g., London, Moncton, Edmonton. Employees who accept permanent work will not receive less than the equivalent of the Basic Weekly Rate of the last position worked prior to going on Employment Security status.

Also pertinent to the resolution of the grievance is the language of Appendix G, of the ESIMA which governs consolidated seniority for employees represented by the Brotherhood. It establishes a mechanism whereby employees represented by the Brotherhood exercise seniority under any supplemental agreement of the Brotherhood and provides, in part, as follows:

7. An employee identified in Items 1 through 5 may exercise his consolidated seniority rights for displacement purposes, including the filling of an unfilled permanent vacancy, if he has exhausted his seniority pursuant to article 7.3(a) of the Plan and is still unable to hold work. Failure to do so will result in forfeiture of consolidated seniority and employment security.

Note: The filling of an unfilled vacancy will be permitted provided that the employee is qualified or can be qualified in a reasonable period of time.

8. An employee who has exercised his consolidated seniority rights into another supplemental agreement will be required to accept recall when permanent work is available in his former agreement. Failure to do so will result in forfeiture of his consolidated seniority and employment security.

9. An employee who has exercised his consolidated seniority rights into another supplemental agreement may accept recall for temporary work in his former supplemental agreement. Such employee will have his permanent position advertised as a temporary vacancy. Upon the expiration of the temporary work he will be required to return to his permanent position. Failure to do so will result in forfeiture of his consolidated seniority and employment security.

10. The provisions outlined in this letter of understanding shall operated over any article in the collective agreement to the contrary.

As complex as the displacement provisions of article 7 of the ESIMA and Appendix G may appear, the point in dispute in the case at hand is relatively narrow, and solely concerns the issue of whether an employee is required, at the initial stages of protecting his or her employment security under article 7.3 of the ESIMA, to protect work on a regional basis if he or she is first unable to protect work within the seniority district, as contemplated under article 7.3(a) of the ESIMA. As noted above, the position of the Brotherhood is that employees under supplemental agreements 10.8 and 10.9 are never required to exercise their regular seniority beyond their seniority district, and cannot be compelled to do so on a regional basis. The Company submits that they are, insofar as the application of article 7.3(a) of the ESIMA is concerned, for the purposes of protecting their employment security status. Further, the Company relies upon the decision of the Arbitrator in **CROA 2535**. That dispute concerned a similar issue which arose between the Brotherhood and Canadian Pacific Limited where it was found that article 7.3A(a) of the Job

Security Agreement between those parties, a provision similar to the language under consideration here, placed an obligation upon the employee to exercise seniority regionally to protect his or her employment security status.

For its part, the Brotherhood stresses a contrary position taken by the Company previously, drawing to the Arbitrator's attention a document dated June 20, 1994 in which the Company expressed its view of the employees' obligation as follows:

> The language of these articles has been reviewed in conjunction with Article 7.3 and Appendix 'G' of the ESIMA and a letter of understanding signed July, 1992 dealing with the exercise of consolidated seniority.
>
> Employees working under Supplemental Agreement 10.8 an 10.9, affected by an Article 8 notice, must exercise their full seniority under the terms of article 4.1. Employees unable to exercise seniority under 4.1 will have the following two options:
>
> 1) they ***may*** exercise seniority under Article 4.2(a) on the Region ***or***
> 2) they must exercise consolidated seniority outside the Supplemental Agreement.
>
> (original emphasis)

It is common ground that the letter of understanding of July 1992 referred to in the foregoing is an agreement whereby the parties acknowledge that in the exercise of consolidated seniority the members of the Brotherhood displace only into collective agreement 10.1 supplements other than their own supplemental agreement. The Brotherhood further notes that the position expressed by the Company, whereby employees "may" exercise their seniority on their region in accordance with article 4.2 to protect their employment security, was incorporated into a signed joint statement of issue initially filed in this grievance which read, in part, as follows:

> … The Company's position as to how the existence of an article 8 notice affects the interpretation of articles 4.1 and 4.2 is as follows:
>
> Affected track and B&B employees must exercise their seniority rights on their Area, in accordance with article 4.1. If they cannot hold a position on their Area they may, if they so choose, exercise their seniority on their Region in accordance with article 4.2, or exercise their consolidated seniority into another Supplemental Agreement. This latter step must be done to maintain their employment security.

The Brotherhood's position remains that article 4.2 of supplemental agreements 10.8 and 10.9 has no application to employees in respect of the protection of their employment security in article 8 circumstances. It submits that, after exhausting article 4.1, employees are to revert to the exercise of consolidated seniority, and are not compelled to protect work on their region before doing so. In support of its position the Brotherhood argues that the decision issued by Arbitrator Dalton Larson, which dealt in substantial part with the displacement obligations of employees subject to an article 8 notice, reflects the intention that employees not be required to displace regionally. Implicit in the position of the Brotherhood is the suggestion that the decision in **CROA 2535** is incorrect, and out of keeping with the intention of the Larson Award.

I turn to consider the merits of the dispute. In doing so it is important, I think, to review carefully the submissions made before Arbitrator Larson, and his comments and conclusion in respect of the displacement obligations of employees compelled to protect employment security under the ESIMA. Firstly, it should be noted that a witness who testified on behalf of the Brotherhood before Arbitrator Larson related an understanding of the operation of the ESIMA, and the obligation to displace, which appears to be contrary to that which is now asserted by the Brotherhood. A partial transcript of the hearing reveals that Counsel for the Associated Railway Unions, which included the Brotherhood, called Mr. Scott Dawson as a witness. Mr. Dawson was the General Chairman of the Western Federation of the BMWE who, it appears, reported to System Federation General Chairman G. Schneider. Counsel for the Company cross-examined Mr. Dawson with respect to the scope of an employee's displacement obligation, and in particular directed his attention to the circumstance of a track maintenance employee governed by the provisions of supplemental agreement 10.8. Mr. Dawson testified that the Mountain Region was comprised of three seniority territories, one extending into the Northwest Territories, another comprising Alberta and a third, British Columbia. During the course of the exchange with the Company's Counsel, Mr. Dawson stressed the distinction between job security benefits and employment security benefits under the ESIMA. In answer to a question of Counsel with respect to whether an employee would be required to go outside his seniority territory to protect his

employment security benefits Mr. Dawson responded in the affirmative. At pp. 95-96 of the transcript the following answers appear:

> **A.** Under the present Plan to – and this is not the Job Security Benefits, I think this is where we get a little confused because this Plan was re-titled to be Employment Security and Income Maintenance to be entitled to the Employment Security, then he would have to exercise on the Region, in accordance with 4.2(b).
>
> **Q.** To exercise his seniority on the regions?
> **A.** To be eligible for the Employment Security not for the Job Security Benefits such as sub-income maintenance.
>
> …

Mr. Dawson then elaborated to explain the Brotherhood's demand, which he states was to reduce the obligation of the employee in respect of displacement so that he or she not be required to protect work on the region as a condition of retaining Employment Security. In this regard he comments:

> **A.** Okay – I think what I have to say in response to that would be that, we're asking that instead of it having to be on the entire region, that to be eligible for Employment Security, you'd have to exercise your seniority to the extent equal to what you have to be eligible for the Job Security Benefits, as opposed to what the present Employment Security specifies which is the entire region.

The Company points to the foregoing passage as evidence that before Arbitrator Larson the Associated Railway Unions tabled a demand that employees not be required exercise their seniority on a regional basis to protect Employment Security. It stresses the testimony of Mr. Dawson as reflecting the Brotherhood's understanding at that time that the displacement obligation under section 7.3(a) of the ESIMA did extend to protecting work on the Region, and not merely on the seniority territory, as it applies to employees under supplemental agreements 10.8 and 10.9.

The evidence before the Arbitrator further discloses that in 1989 the parties had discussions relating to the displacement obligations of employees adversely affected by the Company's Track Force Mechanization (TFM) Program. In that case it appears that the Brotherhood agreed to require employees under collective agreement 10.8 to displace onto the region. The documents before the Arbitrator, however, fall short of establishing that any general understanding in that regard was reached, beyond the implementation of that particular program. As noted in a Company document placed in evidence, the Brotherhood declined to sign a letter of November 13, 1989 incorporating the parties' agreement on the displacement procedure for the TFM. It appears that the Brotherhood's primary concern was the ability of the employee to displace a junior employee in a given classification, rather than the junior employee, a position which was accepted. In the result, the experience of the TFM is less than conclusive of a general intention of the parties with respect to the normal application of article 7.3(a) of the ESIMA, and is of limited value for the purposes of this grievance.

However, when regard is had to the language of the Larson Award, it is far from clear to the Arbitrator that Mr. Larson necessarily took the view that employees subject to collective agreements supplementary to collective agreement 10.1 do not have an obligation to displace onto the region to protect their employment security, as suggested by the Brotherhood. At p. 29 of his award Mr. Larson reviews the proposal tabled by the companies in respect of a broadening of the obligation to protect work on a regional basis. The proposal provided, in part, as follows:

> **1.** Revise the employment security provisions to require an employee in order to retain employment security:
>
> **(a)** on a region-wide basis to displace or fill an unfilled permanent vacancy in a position represented by his or her bargaining agent;
>
> **(b)** on a region-wide basis displace or fill an unfilled permanent vacancy in a position represented by another union signatory to the employment security provisions;

> Employee will carry his/her full seniority under (a) or (b), and shall forfeit all seniority rights on the seniority roster vacated.

At p. 63 of his award Arbitrator Larson declined to give effect to the general amendment proposed by the companies. A reading of the entire text, however, suggests that he viewed the companies' proposal as being new in that it would involve employees exercising seniority on a regional basis not only within their own bargaining unit, but also within other bargaining units of their union, and those of other unions participating in the ESIMA. The arbitrator rejected that proposal as, in his view, it would unduly erode the integrity of the seniority units. As a compromise, however, he established the concept of consolidated seniority, as reflected at pp. 68-70 of his award. For the purposes of the Brotherhood's agreement, that involves consolidated seniority as among the various seniority rosters within the various collective agreements supplemental to collective agreement 10.1.

Viewed in the overall context of Mr. Larson's award, the argument of the Brotherhood that the Company's proposal to Mr. Larson was an acknowledgment that no regional obligation previously existed is not necessarily compelling. The Company's position can be understood on the basis of its tabling a full set of language to deal with all circumstances, including a form of multi-union consolidated seniority. When close regard is had to the text of the Larson Award there is reason to conclude that he viewed article 7.3(a) of the ESIMA as including an obligation of displacement to the regional level. At p. 26 the following comment appears:

> By contrast, "employment security" means protection against the loss of employment. An employee with 8 years of cumulative compensated service is not subject to layoff as the result of the introduction of a technological, operational or organizational change provided that he exercises his maximum seniority rights, e.g., location, area and region in accordance with the terms of his particular collective agreement. …

It is of course arguable, as the Brotherhood asserts, that the use of the word "region" in the foregoing passage only refers to employees whose supplemental agreements require regional displacement, unlike agreement 10.8 and 10.9. However, at p. 57 of his award, Arbitrator Larson makes the following general comment, consistent with the evidence given by the Brotherhood's witness:

> ***In the railway industry it has been an express incident of the various collective agreements that an employee relocate, at least, within the boundaries of his region in order to preserve his employment security.*** Even if it were not an express contractual commitment, it is arguable that mobility is a feature of the industry and that a person who hires onto a national railway must be prepared to move from time to time as a condition of employment.
>
> In all events, subject to the amendments that I shall prescribe in this award, I think that relocation under the circumstances prescribed by the Employment Security Plan is an entirely reasonable obligation. However, there are circumstances when an employee should not be required to relocate and it is those that I intend to address.
>
> (emphasis added)

Mr. Larson then went on to deal with the limitation on the obligation of an employee to displace to another location where he or she has already done so within a five year period.

The comments of Arbitrator Larson on page 57 are obviously consistent with the award in **CROA 2535**. He expresses the obligation to move on a regional basis as being one which an employee bears "at least". He does not express it in terms of being an obligation which only some employees (presumably employees covered by supplements other than 10.8 and 10.9) are obliged to fulfill "at most". When the comments of Arbitrator Larson found at p. 57 of his award are construed in light of the Brotherhood's own evidence, adduced through Mr. Dawson, it is difficult to conclude that Arbitrator Larson originally intended to hand down an award whereby the employee's obligation of displacement under article 7.3(a) of the ESIMA would not extend to the region. Indeed, if this case were to be resolved solely on the basis of the evidence before Mr. Larson and the text of his award, the Arbitrator would be compelled to draw the same conclusion as was reached in **CROA 2535**.

In my view, however, the instant case cannot be properly resolved on that basis. The issue in this grievance is the ultimate understanding and intent of the Company and the Brotherhood. Regard must, therefore, be had to the totality of the evidence to determine the understanding of both parties in the aftermath of the Larson Award. As accustomed as the parties may be to the intricacies of collective bargaining, it seems undeniable that there has been a

degree of confusion and uncertainty surrounding the nature of employees' rights relating to the protection of employment security. It does not appear disputed that that uncertainty caused some contact and discussion between representatives of the parties over the years, with respect to the operation of the ESIMA, both in particular circumstances, such as the TFM, and in general. In approaching a case of this kind it is important to bear certain basic principles in mind. The Larson Award is not a statute, but rather an arbitration award which forms the basis of the parties' agreement, including the terms of the ESIMA. It is the parties themselves who ultimately give meaning to their agreement, and they may well choose to adopt a shared interpretation which is not entirely consistent with the arbitrator's original intention.

I am satisfied that even if, as reflected at pp 57-58 of his award, Arbitrator Larson contemplated an obligation to displace regionally for all employees under the ESIMA, both the Company and the Brotherhood eventually departed from that view and came to a different understanding. It has been the Brotherhood's view that employees under supplemental agreements 10.8 and 10.9 are not required to displace onto the Region for the purposes of article 7.3(a) of the ESIMA, and indeed that position is central to this grievance. What does the record disclose as regards the Company? In the Arbitrator's view the best evidence of the Company's view of its understanding with the Brotherhood must be taken as reflected in the policy position of June 20, 1994 which, I think, bears repeating:

> The language of these articles has been reviewed in conjunction with Article 7.3 and Appendix 'G' of the ESIMA and a letter of understanding signed July, 1992 dealing with the exercise of consolidated seniority.
>
> Employees working under Supplemental Agreement 10.8 an 10.9, affected by an Article 8 notice, must exercise their full seniority under the terms of article 4.1. Employees unable to exercise seniority under 4.1 will have the following two options:
>
> 1) they ***may*** exercise seniority under Article 4.2(a) on the Region ***or***
>
> 2) they ***must*** exercise consolidated seniority outside the Supplemental Agreement.

Significantly, the above position of the Company became incorporated into the joint statement of issue originally filed in this grievance, and signed by both parties. In other words, the Company's policy position was knowingly espressed as a legal position for the purposes of this grievance, by being included in a joint statement of issue which, by the rules of this Office, would limit the jurisdiction of the arbitrator with respect to the matters in dispute. On the basis of the initial Joint statement of issue, that displacement onto the region is not mandatory for employees under agreements 10.8 and 10.9, for the purposes of the ESIMA, was agreed between the parties, and was not a matter in dispute. At that point in time, whatever the history of the administration of these provisions may be, the parties were clearly on record, indeed in documentation instrumental to the resolution of disputes in this Office, that by their agreement employees under supplemental agreements 10.8 and 10.9 are not obliged to displace regionally to protect their employment security.

It is only after the publication of **CROA 2535**, which rendered a different interpretation in the agreement between Canadian Pacific Limited and the Brotherhood, that the Company reversed its position to assert that movement onto the region is not optional, but is obligatory as a condition of protecting employment security for employees under the two supplemental agreements. It is perhaps understandable that the employer would wish to move to that position. However, the Arbitrator is not at liberty to ignore the clear evidence as to what the Company is on record as having agreed to, and cannot simply give effect to what it would wish. As the record reveals, the Company and the Brotherhood were *ad idem* on the displacement obligations of employees under supplemental agreements 10.8 and 10.9. They communicated to this Office, through their original joint statement of issue, their agreement that employees are not required to displace regionally for the purposes of article 7.3(a) of the ESIMA. The fact that Canadian Pacific Limited may never have shared that view with the Brotherhood, resulting in the award in **CROA 2535** being consistent with a strict reading of the Larson Award, is neither here nor there. As noted above, the issue before me is to determine, on the balance of probabilities, the understanding of the Company and the Brotherhood with respect to the meaning of their ESIMA. For the reasons related, I am satisfied that the original joint statement of issue, signed by the Company and forwarded to this Office is the best evidence of that mutual intention.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the interpretation of the Brotherhood to the effect that the displacement option found in article 4.2 of supplemental agreements 10.8 and

10.9 is not made mandatory by the provisions of article 7.3(a) of the ESIMA is correct, and that no regional displacement obligation independent of the collective agreement exists under that article. The Arbitrator therefore orders that any employees who have been forced to relocate in pursuance of the Company's interpretation be returned to their seniority territory and, in cases where economic loss can be established, be compensated for any loss in wages and benefits which may have resulted. Further, any employees who were displaced or laid off as a result of the interpretation applied by the Company shall likewise be entitled to be made whole by returning to their former position, with compensation for any wages and benefits lost. The Company is further directed to compensate any employees in respect of expenses incurred in relation to their return from relocation.

February 8, 1995

(signed) MICHEL G. PICHER
ARBITRATOR