CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 2563

Heard in Montreal, Tuesday, 11 April 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Based on the parties' written submissions.

There appeared on behalf of the Company:

M. J. Gleason	– Counsel, Ottawa
N. Dionne	– Manager, System Labour Relations, Montreal
C. Morgan	– Labour Relations Officer, Toronto
J. Little	– Coordinator, Engineering, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. Philips	– General Chairman, Toronto
A. Trudel	– General Chairman, Montreal

SUPPLEMENTARY AWARD OF THE ARBITRATOR

This matter came on for further hearing at the request of the Brotherhood. It alleges that the Company has failed to abide by and implement the award of the Arbitrator herein dated February 8, 1995. It seeks two things from the Arbitrator. Firstly, a finding that the Company has failed to comply with the award and a direction that it cease and desist from doing so, an order which the Brotherhood may enforce through the Courts; secondly, it seeks a direction from the Arbitrator to require the Company to produce to the Brotherhood all documents and records concerning the movement of employees pursuant to the article 8 notice under the Employment Security and Income Maintenance Agreement for the purpose of determining which employees have been wrongfully displaced beyond their basic seniority territories in contravention of the ESIMA and the collective agreement, as well as employees incidentally displaced within their own seniority territories by employees who were forced to displace on the Region. It also seeks all information necessary to determine the loss of wages and benefits, if any, suffered by all of the employees concerned. The Brotherhood submits that the foregoing information is essential to the ultimate implementation of the Arbitrator's award, which could involve the return of some 400 employees to their seniority districts of origin, and the unravelling of a substantial number of related displacements of other employees.

The Company requested the Arbitrator to effectively stay or adjourn these proceedings pending the outcome of an application for judicial review pending before the Quebec Superior Court. On March 14, 1995 the Company filed a motion in evocation before the Superior Court of the District of Montreal, seeking to quash the Arbitrator's award of February 8, 1995. It therefore submitted to the Arbitrator, as a first position, that he should make no further order or directions in the instant case, because the successful outcome of the judicial review, scheduled for hearing at Montreal on April 18, 1995, could negate or nullify substantial manpower adjustments, which would otherwise involve the possible movement of hundreds of employees back to their seniority districts of origin. The Company

argued that the balance of convenience supports awaiting the decision of the Quebec Superior Court, as it would serve little purpose to put the Company and employees to the disruption and expense of returning from their present postings, only to have that measure ruled inconsistent with the collective agreement and ESIMA, and rendered unnecessary by a subsequent decision of the Court quashing the award. The Company submitted that in these particular circumstances, therefore, the implementation of the original award herein should await a final determination by the Court as to the jurisdictional correctness of the Arbitrator's award.

As a second submission, the Company argued that the Arbitrator is without jurisdiction to entertain any further motions in respect of this matter, as the award does not contain any express reservation of jurisdiction for that purpose.

Thirdly, Counsel for the Company submitted that this Board is without jurisdiction to order the production of documents directly to the Brotherhood, outside the context of an actual hearing, in the manner requested. She argued that the Brotherhood's submission to the effect that the provisions of the **Canada Labour Code**, and in particular section 60 which defines the powers of a board of arbitration, as well as section 16 of the **Code**, does not extend to the kind of procedural assistance sought by the Brotherhood in the instant application. In support of that view she referred the Arbitrator to the decision of the Supreme Court of Canada in **Canadian Pacific Airlines Ltd. and Canadian Airline Pilots Association** (1993) 3 S.C.R. 725.

In reply, Counsel for the Brotherhood argued that it is not within the scope of the Arbitrator's powers to consider a "stay of proceedings" in the manner requested by the Company. He directed the Arbitrator to the provisions of articles 834.1 and 846 of the **Quebec Code of Civil Procedure**. He submitted that article 834.1 provides that only a court of competent jurisdiction may, upon an application for extraordinary relief, grant a suspension of proceedings. Similarly, he noted that Superior Court may, as part of its supervisory jurisdiction in evocation, grant the interim relief of a stay of proceedings. On that basis, Counsel submitted that the proper forum for the Company's request is not the board of arbitration, but rather the Quebec Superior Court.

I turn to deal with the issues raised. Firstly, it is appropriate to consider whether this Board is *functus officio* by reason of the fact that there is no express reservation of jurisdiction on the face of the award. For the reasons related to the parties at the hearing, the Arbitrator cannot accept the submission of the Company that this Office does not retain jurisdiction for the purposes of the interpretation and implementation of the award of February 8, 1995. The Canadian Railway Office of Arbitration hears and disposes of an average of more than 130 grievances annually. The awards are generally in an abbreviated form, in keeping with the expedited nature of the proceedings which the parties have developed in this Office over the decades. As a matter of convenience, the Arbitrator does not expressly state in respect of each and every grievance which succeeds, in whole or in part, that the Office retains jurisdiction to resolve any dispute in respect of the interpretation or implementation of the award. This is in keeping with an understanding among all parties to the Canadian Railway Office of Arbitration, as reflected in a letter from the Administrative Committee of the Canadian Railway Office of Arbitration, of which the Company is a participant, dated August 4, 1989. It states, in part:

> At the annual meeting of the Administrative Committee of the Canadian Railway Office of Arbitration held in this office 20 June 1989, a motion was brought forward and approved by all members of the Committee confirming the historical practice of the Arbitrator for the Canadian Railway Office of Arbitration to retain jurisdiction in respect of interpretation and implementation of awards.
>
> While the standard practice of ad hoc arbitration may be for boards of arbitration to specifically indicate that they retain jurisdiction, this was and is not always so indicated on CROA awards. However, since its inception it has been the practice, accepted by all members signatory to the memorandum of agreement establishing the Canadian Railway Office of Arbitration, that the arbitrator does remain so seized.
>
> Therefore, for the purposes of fulfilling this Office's mandate, and to avoid technical arguments about the arbitrator's jurisdiction, would you please advise the appropriate officers of your organization that the Committee has confirmed that in all cases, without the necessity of saying so, "the Arbitrator retains jurisdiction in the event of any dispute respecting the interpretation or implementation of any CROA award."

(See also supplementary awards to **CROA 901** and **1861**.)

The thrust of the letter, very simply, is to advise all participants in arbitrations before the Canadian Railway Office of Arbitration that, notwithstanding that an award may contain no direct reference to the CROA arbitrator remaining seized, it is implicit and understood that in each and every case he or she does so. That, indeed, has been the understanding and practice in this Office for many years. In the result, the Arbitrator cannot accept the suggestion of the Company that this Office is *functus officio* with respect to resolving any disputes relating to the interpretation or implementation of the award herein. The parties were so advised at the hearing and, upon the Arbitrator communicating the prior correspondence to the Company's representatives at the hearing, its position in this regard was not pursued.

Since the hearing, the Superior Court of Quebec issued its decision in the application for evocation. In a judgment dated May 7, 1995, Bishop, J. of the Superior Court of Quebec dismissed the Company's petition in evocation. Subsequently, the Arbitrator participated in a conference call during which Counsel for the Company advised that the motion for a stay or adjournment of proceedings was withdrawn. It was further stated, by Counsel for both parties that in light of these developments they will recommend to their respective clients that they meet as soon as possible to exchange information and to attempt to agree on a process to resolve their dispute. However, Counsel for the Brotherhood requested that the matter be rescheduled for hearing, both as a catalyst to discussion and to ensure that the matter will be dealt with should the parties be unable to resolve it. That suggestion was not opposed by Counsel for the Company, although there was some divergence as to the appropriate date for rescheduling. In light of the fact that the parties are now engaged in extensive negotiations for the mediation and arbitration of their collective agreement, the Arbitrator is of the view that it is preferable to reschedule this matter for September of 1995, to allow a reasonable period of time for a process of meaningful consultation and possible settlement. Accordingly, the General Secretary is directed to schedule this matter for further hearing in September of 1995.

I now turn to consider the final issue to be addressed. The evidence discloses that after the award of February 8, 1995, the Company continued to force employees to take positions outside their seniority districts in both New Brunswick and Ontario, as a condition of retaining their employment security. Its position is reflected in a memorandum from the Company's Assistant Vice-President of Labour Relations and its Chief Engineer, dated February 23, 1995, expressly directing its field officers to continue to administer the ESIMA in the same manner as before the award, forcing employees onto the Region. The Brotherhood seeks a declaration that the Company's continued practice violates the Arbitrator's award and a direction that the Company cease and desist forthwith from continuing its practice. It seeks the foregoing declaration and direction for the purposes of obtaining enforcement of the award of February 8, 1995 in the courts.

What does the balance of convenience suggest in respect of this aspect of the dispute? From the standpoint of the Company, it was arguable that prejudice might be suffered if it should be unable to continue its practice, particularly if the Employer had eventually prevailed in the Court. If a protected employee is not forced beyond his or her seniority district to take a position on the Region, that employee would revert to employment security status, remain in his or her seniority district and receive full wages and benefits, possibly doing little or no productive work. As the same time, the Company would be required to pay another employee to do the work on the Region which the protected employee would otherwise have performed or, in the case of a vacancy, hire a new employee to do the work in question. There might, in the result, have been a very real consequence in costs to the Company, cost which might be unrecoverable should the Court have annulled the Arbitrator's award.

On the opposite side of the ledger, however, there is a very real prejudice to employees who are still being forced to work outside their seniority district, in some cases away from their homes and families, pursuant to a Company policy which the Arbitrator has ruled to be contrary to the agreement of the parties. Although the employees may not necessarily suffer monetary loss, there is an arguably irreparable hardship to them if they are forced to live away from their homes and families to retain their employment security. In the case of employees forced to move, particularly after the Arbitrator's award, it is not likely that full redress for their personal inconvenience and loss will be possible, even given that the Arbitrator's award has been sustained by the Court.

In my view, equity and the balance of convenience favour a respecting of the *status quo* of the award by the Company, at least insofar as the transfer of further employees after the award is concerned. Given the very real dislocation to employees occasioned by the Company's actions, the Company should be expected to forebear from the application of its policy to the additional employees.

It should be stressed, however, that the Arbitrator's determination and declaration in respect of this issue does not extend to the case of employees who have elected or may elect to move beyond their seniority district on a voluntary basis. It is far from clear to the Arbitrator that the award of February 8, 1995 dealt with that circumstance, although the Brotherhood's representative appears to believe that it did. That matter, at best, remains to be further argued.

The Arbitrator therefore finds and declares that the Company has knowingly failed to apply the collective agreement and the ESIMA in a manner consistent with the Arbitrator's award herein of February 8, 1995. It has done so by forcing employees in New Brunswick and Ontario to displace beyond their seniority district as a requirement of protecting their employment security status. The Company is directed forthwith to cease and desist from such practice. For the purposes of clarity, the foregoing declaration and direction are fashioned to facilitate their enforcement by the Brotherhood through the Courts, if necessary.

Subject to the foregoing, the matter is remitted to the parties, and the Arbitrator continues to retain jurisdiction, with the hearing to be reconvened as scheduled in September, failing settlement.

May 18, 1995

(signed) MICHEL G. PICHER
ARBITRATOR