CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2592

Heard in Montreal, Tuesday, 14 March 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

The effect of Article 8 changes on employees on temporary lay-off at date of implementation.

JOINT STATEMENT OF ISSUE:

On July 18, 1994 the Company implemented a reorganization of its engineering forces. The position of the Company during this reorganization was that employees on temporary lay-off at the time of implementation would not be eligible for employment security benefits.

The Union contends that: employees who are on temporary lay-off on the date of issuance of the article 8 change are, if qualified under the ESIMP, fully eligible to receive the benefits of article 8 protection.

The Union requests that: the Arbitrator find in its favour and declare that employees on temporary lay-off at the time of the article 8 change are entitled to full article 8 benefits.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) R. A. BOWDEN	(SGD.) M. M. BOYLE
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

M. Hughes	– System Labour Relations Officer, Montreal
W. Agnew	– Regional Manager, Labour Relations, Moncton
I. Steeves	– District Manager, Moncton
J. C. McDonnell	– Counsel, Toronto

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

AWARD OF THE ARBITRATOR

The Arbitrator has substantial difficulty with the position advanced by the Brotherhood in this case. It submits that employees who are laid off, and whose opportunities for recall to work are diminished by reason of a technological, operational or organizational change which gives rise to an article 8 notice under the terms of the Employment Security and Income Maintenance Agreement (ESIMA), are themselves entitled to employment security protection within the terms of that agreement.

When an article 8 notice issues, a number of procedures follow, within the terms of the ESIMA. Initially, the parties are to negotiate with a view to minimizing the adverse effects on employees. That is reflected in article 8.4 which provides as follows:

> **8.4** Upon request the parties shall negotiate on items, other than those specifically dealt with in The Plan, with a view to further minimizing the adverse effects on employees. Such measures, for example, may be related to exercise of seniority rights, or such other matters as may be appropriate in the circumstances, but shall not include any item already provided for in The Plan.

Article 8.1 itself speaks to the obligation of the Company to give not less than four months' notice "… with a full description thereof and with appropriate details as to the consequent changes in working conditions and the expected number of employees who would be adversely affected." The ESIMA itself further contains a number of provisions which are fashioned to minimize the adverse impact of changes upon employees. These include elements such as the maintenance of basic rates and severance payments.

If the Brotherhood is correct in its position, an employee who is at home on layoff would, upon the event of an article 8 notice, immediately revert to receiving full pay and benefits, although he or she would not return to active work. This, the Brotherhood argues, is by reason of the consequent adverse impact upon the laid off employee as regards his or her chances of recall, as a result of the technological, operational or organizational change implemented by the Company. The Brotherhood submits that there is nothing within the language of the ESIMA to specifically exclude laid off employees from its protections. In this regard it distinguishes the treatment of casual and part-time employees who are excluded from the provisions of the agreement by virtue of article 11.2. The Brotherhood further refers to article 7.1 of the ESIMA which provides as follows:

> **7.1** Subject to the provisions of this article, and in the application of article 8.1 of The Plan, an employee will have employment security when he has completed 8 years of cumulative compensated service with the Company. An employee on laid-off status on the following dates will not be entitled to employment security under the provisions of this article until recalled to service.
>
> | **Laid-off status** | **For Employees formerly covered by the** |
> |---|---|
> | 18 June 1985 | Associated Non-Operating Railway Unions (The Plan dated 18 June 1985) |
> | 11 April 1988 | Rail Canada Traffic Controllers (Article 31, Agreement 7.1; Article 30, Agreement 7.3) |

Counsel for the Brotherhood submits that the foregoing provision suggests that the parties addressed their mind to the status of laid off employees and excluded only those laid off employees described in article 7.1 for the purposes of the application of the employment security protections of the agreement.

The Arbitrator cannot agree. As explained by the Company's representative, the reference to the two categories of laid off employees found in article 7.1 of the ESIMA has as its sole purpose to clarify that employees who were on lay off at the dates in question could not invoke retroactive entitlement to the protections of the agreement. It cannot, on its face, be reasonably interpreted as an implicit acceptance on the part of the parties to the ESIMA that all other laid off employees would, without qualification, be entitled to the full protections of employment security in the event of an article 8 notice during the currency of their lay off.

Employees who are laid off by the Company by reason of such factors as declines in traffic cannot invoke the protections of the ESIMA, although they may have certain other lay off protections or entitlements. Employment

security is available to active employees as a protection against lay off by reason of any action on the part of the Company which is within its own control, by way of technological, operational or organizational change. That distinction is critical to an understanding of the ESIMA as a whole. Absent clear and unequivocal language to justify it, the Arbitrator fails to understand by what rationale an employee who is laid off by reason of a decline in work beyond the Company's control is to be effectively returned to full pay and benefits status by reason of a subsequent article 8 notice in relation to a technological, operational or organizational change which takes place when the employee in question is no longer at work.

Issues similar to that raised in the instant case have been considered previously by boards of arbitration in the railway industry. It is particularly instructive to examine the different language of the ESIMA considered by the Arbitrator in **SHP-285** between the Canadian National Railway Company and International Association of Machinists and Aerospace Workers, an award dated December 7, 1989. The language of article 7.2 of the ESIMA in the case presently before the Arbitrator reads as follows:

> **7.2** An employee who has employment security under the provisions of this article will not be subjected to layoff as the result of a change introduced through the application of article 8.1 of The Plan.

Article 7.2 of the ESIMP considered in the Machinists case read as follows:

> **7.2** An employee who has employment security under the provisions of this article will not be subjected to layoff **or continuing layoff** as the result of a change introduced through the application of article 8.1 of The Plan.
>
> (emphasis added)

As can be seen from the above, the ESIMP which was the subject of **SHP-285** contained specific language relating to an employee with employment security being subjected to "continuing layoff" as a result of an article 8 notice. The phrase "continuing layoff" does not appear in article 7.2 of the instant ESIMA. At pp. 5-6 of **SHP-285** the Arbitrator comments, in part, as follows:

> … The words "continuing layoff" appearing in article 7.2 of the Plan must be taken to mean a layoff which is ongoing as at the effective date of the Article 8 notice. In that circumstance, for example, an employee with employment security who was already laid off for reasons other than technological, operational or organizational change retains the right to assert his or her employment security, subject always to the procedural requirements of the Plan.

As the foregoing passage indicates, by the adoption of similar language to that found in the Machinists ESIMP the parties could have specifically provided for the protection of employees who would be required to undergo the continuation of a layoff by reason of an article 8 notice. They have not done so, and bearing in mind that the Employer in the case at hand is one and the same, there is little reason to conclude that the parties omitted any reference to "continuing layoff" without appreciating the consequences of the wording adopted.

From a purposive standpoint, it is not unreasonable to conclude that the parties did not intend laid off employees to revert to employment security status, absent clear and unequivocal language in the terms of their agreement to reflect such a condition. Prior cases confirm a tendency of parties generally to circumscribe employment security or job security protections. As was noted in **Ad Hoc 322**, an arbitration award between the Canadian National Railway Company and the United Transportation Union dated June 22, 1993, in relation the application of the material change provisions of the collective agreement there under consideration the Arbitrator commented:

> The terms of article 79, and both the negotiated and arbitrated settlements which have been made under that provision, contemplate that employees who suffer materially adverse effects are those who are directly impacted, in that their earnings or work opportunities are immediately affected, through the operation of the abolishments and the ensuing chain of job displacements. Impacts such as demotion, a reduction in working hours, relocation and the like are those which are intended to be addressed by the protective provisions of article 79. Its provisions are not intended to extend so far as to cover persons whose working circumstances do not change, and who may or may not be affected in their long term career advancement. It would, in the arbitrator's view, require clear and unequivocal language in the terms of the collective agreement to suggest that the parties would have intended such a broad and open-ended form of protection, or such a

> counterintuitive definition of "materially adverse effects" within the meaning of article 79.1 of their collective agreement. No such language is to be found in article 79.1

Similarly, this Office dealt with the rights of laid off employees in the similar context of an article J notice in relation to an agreement between VIA Rail Canada Inc. and Canadian Brotherhood of Railway, Transport & General Workers, in **CROA 2148**. In that award the following appears:

> … A review of the terms of the instant Special Agreement negotiated between the Brotherhood and the Corporation gives a clear indication of the parties' understanding of which employees would be viewed as adversely affected within the meaning of Article J of the agreement. Repeatedly the various benefits described within the agreement are said to be available to employees whose positions are abolished due to the Article J notice or who are displaced by a senior employee (see, e.g., Articles A.1, A.2, C.1, E.1 and G.1).
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> In the instant case the evidence establishes that Ms. Gaudet was not able to hold regular work prior to January 15, 1990. She did not hold a position which was abolished nor was she displaced as a result of the Article J notice. While it may be, as the Brotherhood submits, that she was not at the time a part-time employee within the contemplation of Article 12.7(a) and therefore did not fall within the class of employees excluded from the provisions of the Supplemental Agreement which governs employment security (see Article 11.1) (an issue on which I make no finding), I am satisfied that in the circumstances she must, for the reasons reflected in the award of Arbitrator Weatherill, be found to be an employee who was not adversely affected by the Article J notice within the intended meaning of that phrase contemplated by the Special Agreement.

The principle that the protection of agreements such as the ESIMA and special agreements negotiated for the protection of employees adversely impacted by Company actions should not extend unduly to employees indirectly or remotely impacted was first articulated by Arbitrator Weatherill in **Ad Hoc 126** which involved the application of a special agreement under the Railway Passenger Services Adjustment Assistance Regulations between Canadian Pacific Limited and the United Transportation Union. In that award he commented, in part, as follows:

> … The cases of those whose positions were abolished and who were unable to hold other jobs are clear, as are the cases of those displaced by the exercise of seniority in such circumstances. It is, however, not clear that persons who did not hold regular positions should be said to be "adversely affected" within the meaning of the Special Agreement, where the effect on their work or earnings is only indirect. While, in a general way, such persons may appear to be "affected" by the change (as, in a general way, were many others), they do not, in my view, come within the class of those contemplated by the Special Agreement as entitled to benefits.

In the result, both on the language of the ESIMA and on the basis of established principle, the Arbitrator is satisfied that the position argued by the Brotherhood in the case at hand cannot succeed. The ESIMA does not, on its face, contain language such as that found in other agreements which would insulate an employee with employment security status from "continuing layoff", such as was found in the **Machinists' case** referred to above. The different language adopted by the parties in the case at hand suggests a different intention, and a different result. That, moreover, is consistent with the reasoning previously applied by boards of arbitration examining the ambit of protection under special agreements and material change provisions similar to the provisions of the ESIMA in the case at hand, as reflected in **CROA 2148** and **Ad Hoc 126**.

The Arbitrator appreciates the concern which motivates the Brotherhood's position. It argues, in part, that the Company can defeat the purpose of employment security and the ESIMA by structuring layoffs to precede an article 8 notice, thereby depriving employees of their rightful protection. The Arbitrator does not accept that an employer could so easily escape its obligations. Clearly, if it could be established that the Company artificially created a layoff, for example for an alleged downturn in business when no such downturn could be proved, for the purpose of defeating the protections of employees in respect of a subsequent article 8 notice, such a scheme must be found to be in violation of the protections of the ESIMA. An employer cannot, by the exercise of bad faith, achieve indirectly that which it cannot do directly under the contracts which bind it. There is no suggestion of such an intention in this case, and there is little reason to believe that the Company would knowingly or deliberately engage is such a course of conduct.

For all of the foregoing reasons the grievance must be dismissed.

17 March 1995

(signed) MICHEL G. PICHER
ARBITRATOR