CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2598

Heard in Montreal, Wednesday, 15 March 1995

concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The Company's failure to restore and properly pay all linehaul drivers who had their MBR's taken away in an improper manner.

UNION'S STATEMENT OF ISSUE:

The Company in late 1993 and in 1994 violated the Collective Agreement and Job Security Agreement by taking away the MBR's for the drivers in question. They further refused to restore or pay the proper rate of pay to them under the terms of the Job Security Agreement.

The Union through the grievance procedure requested that the Company restore the MBR's and also pay all the proper monies owed these employees in question but the Company declined

FOR THE UNION:

(SGD.) G. RENDELL
FOR: EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
B. F. Weinert	– Director, Labour Relations, Toronto

And on behalf of the Union :

H. Caley	– Counsel, Toronto
D. Dunster	– Executive Vice-President - Trucks, Ottawa
J. J. Boyce	– National President, Ottawa

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the Company terminated the maintenance of basic rate (MBR) protection of some ten employees. Three employees had their MBR protection ended because they failed to bid on sleeper team positions bulletined in Hamilton. With respect to the balance of the employees concerned, their MBR protection was eliminated because their actual earnings exceeded the established incumbency rate when averaged over ten consecutive pay periods.

Incumbency rates for mileage rated drivers are established under the terms of article 32.3 of the collective agreement which provides as follows:

> **32.3** Incumbency rates for mileage rated drivers under the provisions of article 5 of the Job Security Agreement are established as follows:
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> The total mileage paid, including General Holidays, work, wait and delay time for the ten pay periods prior to the change divided by the number of days for which payment was received to establish a daily rate of pay.
>
> **NOTE**: Two trips on one day with layover between trips constitutes two days' work.

The provisions of the Job Security Agreement pertinent to the grievance are as follows:

> **5.8 Maintenance of Basic Rates**
> An employee whose pay is reduced by $2.00 or more per week, by reason of being displaced due to a technological, operational or organizational change will continue to be paid at the basic weekly or hourly rate applicable to the position permanently held at the time of the change providing that, in the exercise of seniority, he
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> **a)** first accepts the highest rated position at his location to which his seniority and qualifications entitle him; or
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> **b)** if no position is available at his home location, he accepts the highest rated position on his basic seniority territory to which his seniority and qualifications entitle him.
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> **i)** The incumbency rate will be maintained until subsequent general wage increases applied on the basic rate of the position he is holding erase the incumbency differential, or
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> **ii)** The employee fails to apply for the highest rated position as required in 5.8(a), or
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> **iii)** The employees' services are terminated by discharge, resignation, death or retirement.
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> **iv)** Incumbency rates established subsequent to the signing of this agreement will be eliminated after 10 consecutive pay periods in which the employee's actual earnings exceeds the established incumbency rate.
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> In the application of (ii) above, an employee who fails to apply for the highest rate position, for which he is qualified, will be considered as occupying such position and his incumbency shall be reduced correspondingly. In the case of a temporary vacancy, his incumbency will be reduced only for the duration of that temporary vacancy.

It is common ground that paragraph (iv) above was recently negotiated into the collective agreement, and was intended to apply to rates of incumbency established after September of 1994. For the purposes of this case, however, it should be noted that the interpretation which the Company applies to the maintenance of basic rates provisions of the collective agreement and the Job Security Agreement is essentially the same. In other words, it maintains that in respect of incumbencies established prior to September of 1994 employees were subject to having their protection eliminated if after ten consecutive pay periods their actual earnings exceed the established incumbency rate.

Upon a review of the material filed, and the arguments of the parties, the Arbitrator is satisfied that in all respects the position argued by the Union is correct, and that the interpretation applied by the Company cannot stand. Firstly, with respect to the employees who lost their incumbencies for having failed to bid sleeper team positions, I must agree with Counsel for Union that the language of article 5.8 of the Job Security Agreement supports the

position taken by the Union. Specifically, article 5.8 speaks in terms of "… the highest ***rated*** position …" (emphasis added) which an employee's seniority and qualifications can obtain for him or her. Reference within the document is clearly to rates, and not to ultimate earnings. The suggestion made by the Company that although sleeper team rates may be lower, miles available and hours of work on sleeper team assignments can result in higher earnings, misconceives the application of article 5.8 of the Job Security Agreement. It is common ground that the mileage rates for sleeper team assignments are lower than the provincial mileage rates for linehaul drivers as reflected in Appendix A to the collective agreement. In other words, from the standpoint of an employee, the rate for spareboard assignments is higher than the rate for sleeper team assignments, notwithstanding the ultimate earnings which might result from either job.

MBR protection is a valuable asset for any employee. In the Arbitrator's view it is essential that an employee be able to know, in advance, whether a job choice which he or she makes will or will not afford protection in respect of his or her MBR rate. If the interpretation advanced by the Company is correct, namely that eventual earnings over time is the test, employees are virtually without any ability to make an informed or certain decision to protect themselves when bidding work. That clearly is not the intention of the collective agreement, or of the Job Security Agreement. With respect to the three employees who lost their MBR by reason of having failed to bid the sleeper team work, the Arbitrator is satisfied that the Company violated the provisions of the Job Security Agreement, as they did not fail to apply for the highest rated position available to them. In respect of those three employees, therefore, the grievance must be allowed.

I am also satisfied that the grievance must be allowed as regards the seven other employees whose MBR protection was terminated by reason of their average earnings over the span of ten pay periods. There is, very simply, nothing in the collective agreement, nor in the Job Security Agreement, to suggest that the Company is entitled to put an end to an employee's MBR protection on the basis that his or her average earnings over a ten pay period span are at any particular level. While article 32.3 of the collective agreement does utilize a ten pay period average for the purposes of establishing an employee's incumbency rate, there is nothing within the document to suggest that the same formula is to be applied, on an ongoing basis, to determine whether an employee should lose his or her MBR protection. I accept the position advanced by the Union that the MBR rate is to be applied on a daily basis, and to be utilized to top up an employee's earnings on any given day when his or her earnings do not come up to the level of the incumbency. An employee's incumbency can, of course, be reduced on a ratable basis, in accordance with the principles reflected in the final paragraph of article 5.8 of the Job Security Agreement. That, however, has no bearing on the merits of the case before me.

In the result, therefore, the grievance is allowed, in whole. The Arbitrator directs the Company to reinstate the MBR protection of the ten employees in question, and to compensate them accordingly. Although the Union seeks a direct order from the Arbitrator, coupled with a declaration that the Company has violated article 5.8, I do not deem it necessary to go further than the findings related above, in the expectation that the Company will in the future administer the MBR provisions in accordance with this award. I do retain jurisdiction, however, in the event of any dispute regarding the compensation of the employees in question, or in respect of any other matter relating to the interpretation or implementation of this award.

17 March 1995

(signed) MICHEL G. PICHER
ARBITRATOR