CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2661

Heard in Montreal, Tuesday, October 10, 1995

concerning

ONTARIO NORTHLAND RAILWAY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

A claim for maintenance of earnings pursuant to article 53A of Agreement No. 8 on behalf of Locomotive Engineer T. O'Grady.

Engineer T. O'Grady was cut from the engineer's spareboard in accordance with article 44.10. Mr. O'Grady no longer held a position under Agreement No. 8 and was required to fill a position under the terms of the UTU collective agreement for which he is qualified.

JOINT STATEMENT OF ISSUE:

It is the position of the Brotherhood that Mr. O'Grady has followed the steps outlined in articles 53A.1, 53A2, 53A.3 and 53A.3(ii) and is therefore entitled to maintenance of earnings as per the note contained in article 53A.3 of Agreement No. 8.

The Company maintains that article 53A does not provide for maintenance of earnings when an ESB returns to the trainmen's ranks as a result of exercising seniority.

The parties are unable to agree on a resolution of the dispute and the matter has been referred for a declaration from the Arbitrator.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) B. E. WOOD	(SGD.) J. D. KNOX
GENERAL CHAIRMAN	DIRECTOR, HUMAN RESOURCES

There appeared on behalf of the Company:

M. J. Restoule	– Manager, Labour Relations, North Bay
J. L. Thib	– Superintendent, Train Operations, Englehart
D. Rochon	– Chief Dispatcher, North Bay

And on behalf of the Brotherhood:

B. E. Wood	– General Chairman, Halifax

AWARD OF THE ARBITRATOR

This dispute raises an issue which is relatively unique within the running trades of the railway industry. Like other railways, the Company has for many years employed trainpersons who become qualified to work as locomotive engineers, generally known as an Engine Service Brakeman (ESB). Since the execution of a memorandum of agreement dated June 14, 1973, the collective agreement has provided for the selection of ESB's from the trainpersons' ranks. Trainpersons so qualified are entitled to maintain and accumulate seniority within the ranks of both the Brotherhood of Locomotive Engineers and the bargaining unit of trainpersons, represented by the United Transportation Union. Provisions within the UTU collective agreement deal with the movement of trainpersons into locomotive engineer work, and their entitlement to work as a trainperson, when not required to do so as a locomotive engineer. In addition, the UTU collective agreement provides a premium payment for ESB's assigned as headend brakepersons on a train. The ability of the ESB to move from locomotive engineer's service back to work as a trainperson is recognized within the memorandum of agreement between the Company and the Brotherhood of Locomotive Engineers. Article E(1) of that memorandum of agreement provides as follows:

> **E (1)** A trainman after being qualified to work as a locomotive engineer, shall be known as an engine service brakeman designated by the letters ESB which will be shown opposite his name on the seniority lists where his name appears. He shall have the right to work as a trainman in accordance with his seniority when not required to work as an engineer.

The instant dispute arises as a result of the employment security provisions which have been negotiated into the collective agreement governing locomotive engineers. It seems that the Ontario Northland Railway is the only company under the jurisdiction of this Office which has provided a form of employment security to its running trades employees, within the provisions of both the BLE collective agreement and the UTU collective agreement. Significantly, the right to the protections of those provisions is not limited to circumstances of technological, operational or organizational change, which are dealt with elsewhere in the collective agreements, but may be invoked when a locomotive engineer's position is abolished, or he or she is displaced, by reason of fluctuations in traffic.

The employment security provisions, and related protections such as the right to maintenance of earnings, were negotiated into the BLE collective agreement in the form of article 53A, as a result of a master agreement between the Company and the Associated Railway Unions made on April 13, 1987.

Article 53A provides, in part, as follows:

> **53A.1** An employee who was in service on December 31, 1992 and who has subsequently attains 7 years' service shall be defined as having "Preferred Employment Security".
>
> **53A.2** Such employee, who is displaced or has his/her job abolished, shall exercise his/her seniority, up to and including his/her basic seniority territory if necessary, in order to retain his/her employment security.
>
> **53A.3** If still unable to hold a position, then in order to retain employment security he/she shall (subject to qualifications);
>
> **(i)** fill an unfilled permanent vacancy within the jurisdiction of another seniority group of the same union covered by the same collective agreement.
>
> **(ii)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group and another signatory union.
>
> **(iii)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group and a non-signatory union or in a position which is not covered by a collective agreement.
>
> **Note:** In the application of above Clauses (i), (ii) and (iii) maintenance of basic wage rates shall apply.
>
> **(iv)** There being none, be placed in a "waiting status" until such time as a vacancy occurs within his/her classification on the seniority territory, or as per Clauses (i), (ii) and (iii)

> above. During this period the employee's U.I. benefits (subject to U.I. approval), and/or outside earnings, will be supplemented to a level equal to 80 percent of his/her weekly base pay continuing until such time as a position is found for the employees in accordance with the foregoing.
>
> Also during this period the employee must accept temporary work at his/her lay-off location.

The grievor, Locomotive Engineer T. O'Grady, was hired as a trainperson on June 21, 1983 under the collective agreement of the UTU. He completed the ESB training program on August 30, 1986 and qualified as an engineer on January 23, 1987. It is common ground that from that time to the present he, like a substantial number of persons on the trainperson's seniority list, moved back and forth between the BLE and UTU bargaining units, working as a locomotive engineer and as a trainperson, depending on the availability of work and the bidding strength of his relative seniority.

On November 21, 1994, apparently as a result of a shortage of work, Mr. O'Grady was removed from the engineers' spareboard. He then returned to the trainpersons' ranks under the UTU agreement, taking a place on the spareboard. There is no evidence to establish that he displaced another trainperson in so doing, and the Brotherhood maintains that in fact a position was established for him on the spareboard.

The position of the Brotherhood is that Mr. O'Grady is entitled to the preferred employment security protections of article 53A in the circumstances. It submits that he was displaced from his job as a locomotive engineer, was unable to hold a position as such and, in the circumstances, was entitled to fill a position within the jurisdiction of the UTU, as a trainperson, with maintenance of basic wage rates, in accordance with article 53A.3. Implicit in the Brotherhood's position is that Mr. O'Grady filled an unfilled permanent vacancy, to the extent that a new position was made for him on the trainperson's spareboard.

The Company submits that the provisions of article 53A were not intended to apply in the circumstances disclosed. It submits that the movement of ESB's back and forth between the ranks of locomotive engineers and trainpersons, an event which occurs with almost daily regularity, is not the kind of displacement contemplated within article 53A. Its representative submits that the article would apply to the limited number of locomotive engineers who do not have ESB status, and could not exercise seniority into the trainpersons' ranks. With respect to those who can exercise such seniority, however, it submits that the article has no application. It stresses that to accept the interpretation of the Brotherhood is to conclude that once an ESB has served a single tour of duty as a locomotive engineer, he or she is never again to be paid at the rate of a trainperson when so assigned.

This case is not without some difficulty. If a literal reading is applied to the terms of article 53A on the facts of the instant case it is arguable that the Brotherhood's position is more compelling. However, a more general examination of the operation of article 53A, within the context of the workplace in which it operates, leads to the conclusion that the interpretation of the Company is to be preferred.

It does not appear to be disputed before the Arbitrator that many of the moves of ESB's from the ranks of locomotive engineers back to the ranks of trainpersons under the UTU collective agreement are done by way of the exercise of the employee's seniority to displace another trainperson, whether in regular service, on the spareboard or otherwise. Before the Arbitrator neither party appears to dispute that for an ESB the exercise of seniority referred to in article 53A.2 means the exercise of seniority in both the BLE and UTU collective agreements. As a general matter, therefore, the protection of maintenance of basic wage rates is intended to apply to employees who are required to fill an unfilled permanent vacancy within the terms of paragraphs (i), (ii) and (iii) of article 53A.3.

In the instant case it would appear that in fact, if the Brotherhood is correct, Mr. O'Grady was arguably placed in a permanent vacancy in the UTU bargaining unit, to the extent that a spareboard position may have been added to accommodate him. However, it does not appear disputable that if no such position had been made available, he could have exercised his seniority as against a more junior trainperson to continue to hold work. Clearly, in the latter circumstance he would not fall within the terms of article 53A.3, and would not be entitled to the protection of maintenance of basic wage rates.

In the Arbitrator's view that reality is telling of the parties' original intention in drafting the language of article 53A of their collective agreement. The protections of article 53A.3 were intended to be available to an employee who could not avail himself or herself of the ability to retain employment by the exercise of seniority. By their very

status, ESB's are able to use their seniority within the ranks of trainpersons under the UTU collective agreement when their work opportunities as locomotive engineers are exhausted. As the evidence before the Arbitrator discloses, in many cases this happens on a weekly, if not daily, basis. If the position argued by the Brotherhood were correct, and Mr. O'Grady should be entitled to maintenance of earnings merely by virtue of the fact that a position was made for him on the spareboard, the Company could avoid that consequence in future cases compelling ESB's to displace into the UTU ranks by the exercise of seniority, rather than adding spareboard or other positions for them to fill. However, the Arbitrator cannot find that Mr. O'Grady moved to an unfilled permanent vacancy within the meaning of article 53.A.3. By definition, "unfilled" permanent vacancy is one which pre-exists the displacement of an employee. In the instant case, the grievor filled a vacancy newly created to accommodate him. It was never unfilled.

I am satisfied that the parties had an understanding as to the back and forth movement of ESB's between locomotive engineer and brakeperson positions, and that the provisions of article 53A were never intended to apply in that circumstance. That is not to say, of course, that a locomotive engineer who is an ESB who should be unable to hold work as a brakeperson by the exercise of seniority should not have the protections of article 53A.3. Clearly such an employee would, as the Company concedes. However, to the extent that the employee could protect himself or herself by the exercise of seniority, under the provisions of article 53A.2 there would, very simply, be no reason to have recourse to the greater protections of article 53A.3

In the Arbitrator's view the above conclusion is sufficient to dispose of this grievance, and it is not necessary to ground this decision on the alternative basis of estoppel argued by the Company. When regard is had to the intention of the parties, however, the fact that no grievances or claims of the type made by Mr. O'Grady were advanced by the Brotherhood between 1987 and 1994, notwithstanding the almost daily movement of ESB's between locomotive engineer and trainperson's ranks, it would appear, on the balance of probabilities, that the interpretation advanced by the Company is consistent with the original understanding and intention of the parties. While it is understandable that a union officer not privy to the original agreement might wish to assert a more narrow interpretation to enhance the rights of the ESB's, the practice followed by the Company over the course of several collective agreements, without objection or grievance, can be looked to as evidence of the original intention of the parties. The practice of the parties, as well as the scheme and language of article 53A itself, point more persuasively to the conclusion that ESB's, in the normal ebb and flow of their movement between the work as locomotive engineers and trainpersons, were not intended to be covered by the provisions of article 53A.3 of the collective agreement.

For these reasons the grievance must be dismissed.

13 October 1995

(signed) MICHEL G. PICHER
ARBITRATOR