CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2684

Heard in Montreal, Wednesday, 13 December 1995

concerning

CANADIAN PACIFIC RAILWAY LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Interpretation of Article 7.10 of the Job Security Agreement (JSA).

BROTHERHOOD'S STATEMENT OF ISSUE:

The Brotherhood's position with respect to JSA Article 7.10 is that if an employee, who is affected by a JSA Article 8 change, exercises his Article 7.10 option to displace and, in so doing, causes relocations, all affected employees, including the employee originally exercising the option, will be entitled to all applicable JSA benefits including, but not limited to, those provided for in JSA Article 6.

The Company's position is that since Article 7.10 provides an option, an employee, affected by an Article 8, choosing to exercise his Article 7.10 option to displace will not trigger any right to relocation benefits, etc., for any employee involved.

The Union contends that: The Company's position is in violation of JSA Articles 6 and 7 in general and Articles 6.1, 7.3A and 7.10 in particular.

The Union requests that: It be declared that in the application of JSA Article 7.10, any employee electing to displace a junior employee, which displacement causes relocations, all affected eligible employees are entitled to all applicable JSA benefits including, but not limited to, those provided for in JSA Article 6. It be ordered that all employees who have been denied entitlements because of the Company's interpretation be compensated therefor.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. T. Cooke	– Manager, Labour Relations, Montreal
S. J. Samosinski	– Director, Labour Relations, Montreal
D. V. Brazier	– Assistant Vice-President, Industrial Relations, Montreal
L. S. Wormsbecker	– Manager, Labour Relations, Montreal
D. E. Guerin	– Assistant Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

D. B. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa

G. D. Housch	– Vice-President, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
D. J. Bujold	– National President, TCU, Ottawa
P. Davidson	– Counsel, Ottawa
G. Beauregard	– General Chairman, Eastern Region
R. Achin	– ESF Plan Administrator

AWARD OF THE ARBITRATOR

The issue raised by the instant grievance is relatively straightforward. The Brotherhood seeks a declaration that any employee who elects to displace a junior employee under the provision of article 7.10 of the 1992 Job Security Agreement (JSA) is entitled to the benefits of the JSA, including relocation expenses provided under article 6.1 of the JSA. Article 7.10 of the 1992 JSA is, for all purposes material to this dispute, virtually identical to article 7.9 of the 1995 version of the Job Security Agreement which is currently in effect.

Article 7.10 of the JSA was first introduced into the language of the agreement on April 29, 1992. It reads as follows:

> **7.10** An employee with employment security who has exhausted maximum seniority at his home location may displace in keeping with his seniority elsewhere on his Basic or Employment Security seniority territory pursuant to the provisions of the applicable collective agreement. However, such employee will not be required to displace beyond his home location if this would result in a junior employee being placed on employment security status. An employee exercising this option shall not forfeit employment security providing he otherwise maintains eligibility.

Article 6.1, which governs entitlement to relocation expenses, provides as follows:

> **6.1** To be eligible for relocation expenses an employee:
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> **(a)** must have been laid off or displaced, under conditions where such layoff or displacement is likely to be of a permanent nature, with the result that no work is available at his home location and, in order to hold other work on the Railway, such employee is required to relocate; or
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> **(b)** must be engaged in work which has been transferred to a new location and the employee moves at the instance of the Company; or
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> **(c)** must be affected by a notice which has been issued under Article 8 of this Agreement and he chooses to relocate as a result of receiving an appointment on a bulletined permanent vacancy which at the time is not subject to notice of abolishment under Article 8 of this Agreement and such relocation takes place in advance of the date of the change, provided this will not result in additional moves being made; or
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> **(d)** must have Employment Security and be required to relocate to have work under the provisions of Article 7 of this Agreement.

While the foregoing provisions are found in the 1992 version of the Job Security Agreement, as noted above, they were reincorporated in substance into the Job Security Agreement which became effective June 1, 1995. It appears that following a memorandum of agreement of May 5, 1995, the parties negotiated the contract language of their revised Job Security Agreement. During the course of that process the Brotherhood raised the issue of the application of article 7.10 and its view that the language of the article entitles an employee who elects to displace beyond his or her home location to the full protections of the JSA, including the payment of relocation expenses as provided under article 6.1. The Company disagreed with that interpretation. In its view article 7.10 was established, on the one hand, to benefit employees by saving them from the requirement to move from their home location to protect their ES status where to do so would only place another employee on ES status while, on the other hand, saving the Company the relocation expenses which would otherwise be triggered by the forced displacement which would have been inevitable, but for the option provided in article 7.10.

Counsel for the Brotherhood submits that the issue is one of simple and straightforward interpretation. He submits that article 7.10 makes no reference to displacement expenses, and cannot be construed as having any

bearing on the entitlement of an employee to that benefit. Counsel maintains that the issue of an employee's entitlement to relocation expenses is fully dealt with within the language of article 6.1 of the JSA. In that light, he submits, article 6.1(d) is controlling.

The Brotherhood submits that article 6.1(d) can only be interpreted to mean that an individual with ES who is without a permanent assignment at his or her home location, and is therefore under the obligation to relocate to "have work" is entitled to receive relocation expenses. Similarly, it submits, any employee displaced by a person making such a relocation is similarly entitled to relocation expenses, as are any other employees with ES who may be impacted by the ripple effect of displacement.

Resolution of the instant dispute requires a brief examination of the history of the employment security provisions found within the JSA. While Counsel for the Brotherhood submits that there is no ambiguity in the provisions to be interpreted, and there should be no reference to extrinsic evidence, the Arbitrator cannot agree. A substantial part of the issue before me is whether an employee who makes the election to displace under article 7.10 can be said to be a person "required to relocate to have work" within the meaning of article 6.1(d) of the JSA. As will become evident from a review of the history of employment security provisions within the railway industry, there is, at a minimum, a latent ambiguity within the concept of a person on employment security having work as opposed to being laid off, as those concepts are traditionally understood.

As noted above, article 7.10 was introduced into the JSA effective April 29, 1992. It is common ground that it has its origins in the special agreement negotiated between the Company and the Shopcraft Unions, earlier the same year, in respect of the closure of the Angus Shops in Montreal. It does not appear disputed that in that circumstance Union representatives sought to shelter employees on ES status at the Angus Shops from the obligation to displace to other locations as a requirement to protect their employment security status. It was then agreed that an employee should be under no obligation to do so if the displacement would only result in the removal of an employee at the subsequent location from active service, placing him or her on ES. The compromise so struck saved employees from the obligation of displacing to another location and afforded the Company the efficiency of avoiding relocation costs where the end result would, in any event, be the placing of another employee on ES status. Later, some months after the closure of the Angus Shops, the same formula was negotiated into the Job Security Agreement, by agreement with representatives of the Brotherhood, as well as the other unions signatory to the JSA. This included the Transportation Communications (International) Union, the Canadian Signal and Communications System Council No. 11 of the IBEW, the Rail Canada Traffic Controllers (effective October 27, 1992) and six Shopcraft Unions now represented by the CAW.

The Arbitrator considers it important to understand the meaning of article 7.10 as it would have operated within the JSA at the time it was agreed to, in 1992. Article 7.1 of the JSA as it then stood granted employment security to an employee with eight years of cumulative compensated service, for employees whose service predates May 1, 1992. Article 7.2 then provided as follows:

> **7.2** An employee who has Employment Security under the provisions of this Article will not be subject to lay-off or continuing layoff as the result of a change introduced through the application of Article 8.1 of the Job Security Agreement.

The foregoing provision mandated that an employee with ES could not be laid off as a result of a technological, operational or organizational change, such changes being the subject of an article 8.1 notice under the JSA. In the result, although their positions might be abolished, the individuals in question continued to retain the right to the payment of full wages and benefits under the terms of the collective agreement. The status of such persons was confirmed to be different from that of persons who are laid off, and whose protections may be limited to lay off benefits, recall rights or severance payments. The issue of the status of employees on ES was addressed in arbitration between the **Canadian National Railway Company and the International Association of Machinists and Aerospace Workers** (SHP-286), a grievance relating to the closure of certain CN operations at Moncton. In that award, dated December 7, 1989, at pp 12-13 the Arbitrator made the following comments about the nature of employment security status:

> The instant dispute turns on the status of employees who have, after the application of all of the displacement provisions described above, been unable to obtain any position or job with an assigned shift and working hours. It is common ground that those employees, insofar as they retain "employment security status" remain at the same location, drawing full salary and benefits. In the

> same manner as employees who are at work, they are subject to all terms of the collective agreement, including the deduction of union dues, and have the benefit of whatever increases in salary or improvements in benefits may accrue from year to year, indefinitely so long as they retain employment security status. Individuals in that position are plainly not laid off, as is reflected by the language of article 7.2 of the ESIMP. There would, moreover, appear to be nothing to prevent the Company from requiring the employees in question to attend at work on such days and for such hours, however irregular and sporadic they may be, as actual work might become available for them to perform. They are, in other words, employees who remain at the disposal of the employer, and may be called to work on an "as needed" basis. In the Arbitrator's view the junior employees who are on employment security status at Gordon Yard can be said, in a general sense, to retain positions of employment which are plainly to be distinguished from the situation of employees on layoff.

An essential part of the original bargain struck in relation to the establishing of employment security was the obligation of the employee to exercise his or her maximum seniority rights to seek active work on a location, area and region basis. Failure to exercise such rights would result in the forfeiture of employment security. The following provisions applied to members of the BMWE:

> **7.3A (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 Job Security Agreement, 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.
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> **(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:
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> > **(1)** fill an unfilled permanent vacancy within the jurisdiction of another seniority group and the same Collective Agreement;
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> > **(2)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group within another Collective Agreement and the same Union;
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> > **(3)** there being none, fill an unfilled permanent vacancy within the jurisdiction of another seniority group and another union.
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> > (For the purpose of this Article 7.3A(b)(3), another union is defined as the BMWE. TCU or CSC System Council No. 11 of the IBEW).
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> > **(4)** there being none, fill an unfilled permanent vacancy in a position which is not covered by a collective agreement.
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> > **NOTE:** In the application of Article 7.3A(b)(4) and notwithstanding the provisions of any Collective Agreement to the contrary, an employee who has Employment Security 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.
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> **7.6** An employee who has Employment Security and who fails to comply with the provisions of this Article will lose his Employment Security. Such employee will, however, be entitled to such other benefits under this Agreement for which he is eligible.

As can be seen from the above, while the benefit of employment security, which was then lifetime protection from layoff, was considerable, the corresponding obligation of the employee to seek such active employment as his or her seniority could secure was onerous. To maintain employment security, and thereby avoid layoff and the possible loss of his or her employment security, the employee was definitively required to protect available work

which his or her seniority could obtain, and that requirement could extend to locations beyond his or her home location, to the area and region (*see* **CROA 2535**).

It is in that context which the language of article 7.10 must be understood to have originated. That article relieved the employee from the obligation to displace from his or her home location where to do so would only place another employee on employment security status. It is significant to note that the language of article 6.1(d), which governed the entitlement to relocation expenses was clearly intended to operate in tandem with the provisions of article 7 of the JSA, the articles which govern the obligation to relocate as a condition of an employee maintaining his or her ES status. The article speaks to employees being "**required** to relocate to have work **under the provisions of Article 7 of this Agreement**" (emphasis added).

It appears to the Arbitrator manifest that an employee whose circumstances give him or her the protections of article 7.10 is clearly not an employee required to relocate to have work in the sense contemplated by the provisions of article 7 of the JSA. The requirement to relocate as it is articulated within the terms of article 7 of the agreement is for one purpose, and one purpose only – to protect the employee from the forfeiture of his or her employment security status. An employee who has the benefit of article 7.10 is not, by definition, required to relocate to have work in order to protect his or her ES status, in accordance with the provisions of article 7 of the JSA. It is that obligation to relocate which is contemplated in article 6.1(d) of the JSA. Clearly, if the provisions of article 6.1(d) fell to be interpreted as they stood in the April 29, 1992 version of the JSA, the position which the Brotherhood now argues could not succeed.

Can it be said that changes made in respect of the JSA as it was revised effective June 1, 1995 have materially changed the relationship between articles 7.10 and 6.1(d) of the Job Security Agreement? The 1995 agreement has seen substantial changes to the concept of employment security. Employment security is no longer a lifetime protection; it now operates for a limited period of years. Further, the Company's liability for employment security is limited to a defined fund contribution, in accordance with a formula found in Appendix E of the Job Security Agreement. Additionally, the protection of the employee, in respect of ES payments from the fund, is now ninety percent of the employee's basic rate of pay. However, the conditions for maintaining an employee's entitlement to employment security continue to be onerous. Article 7 of the JSA now provides, in part, as follows:

> **7.2 (a)** An employee who has ES under the provisions of this Article who is subjected to lay-off or continuing lay-off as the result of a change introduced through the application of Article 8.1 of the Job Security Agreement shall be eligible for ES payments from the Employment Security Fund (ESF) established pursuant to Appendix E.
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> **(b)** ES payments shall be 90%, unless subsequently modified, of the employee's basic rate of pay minus all regular deductions including union dues, paid out of the ESF. If an employee is eligible for Unemployment Insurance (UI), the UI shall be topped up to represent 90%, unless subsequently modified, of the employee's basic rate of pay from the ESF, subject to SUB registration with Human Resources Development Canada. All benefits while an employee is on ES shall be maintained, paid out of the ESF, as if the employee were actively employed by the Company.
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> **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 Job Security Agreement, shall be required to do the following, on an ongoing basis, provided the employee is qualified or can be qualified in a reasonable period of time, in order to protect his ES:
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> > **(1)** exercise his seniority rights on his Basic Seniority Territory (BST) in accordance with the terms of the collective agreement;
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> > **(2)** fill an unfilled permanent vacancy at the headquarters of the employee in a position represented by the BMWE in which the employee in question does not have previously established seniority;
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> > **(3)** fill an unfilled permanent vacancy on the BST of the employee in a position represented by the BMWE in which the employee in question does not have previously established seniority;

(4) fill an unfilled permanent vacancy on the Region of the employee in a position represented by the BMWE in which the employee in question does not have previously established seniority;

(5) exercise seniority of the Region to displace the junior employee holding a permanent position in the classification from which affected at the time of the Article 8 notice. If unable to do so, then he must displace the junior employee holding a permanent position in any other classification in which he holds previously established seniority. Such employee shall be required to accept recall on his former BST only when permanent work is available. Failure to do so shall result in forfeiture of employment security and all seniority on his former BST. In the application of this article, the affected employee shall carry the seniority dates from his previous seniority territory in the classification into which he displaced and all lower classifications or groups;

(6) exercise consolidated seniority on the Region in accordance with Appendix C.

(b) An employee who has ES under the provisions of this Article and is unable to hold a position in accordance with Article 7.3(a) shall be required to exercise the following options provided the employee is qualified or can be qualified in a reasonable period of time to fill the position involved. In filling vacancies, an employee who has ES must exhaust such available options. Initially on a local basis, then on his basic seniority territory, then on the Region:

(1) fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit;

(2) there being none, fill an unfilled permanent vacancy in a position which is not covered by a collective agreement.

NOTE 1: In the application of this Article 7.3(b) and notwithstanding the provisions of the Collective Agreement to the contrary, an employee who has ES while employed outside the BMWE bargaining unit shall continue to accumulate all seniority in the BMWE. Employees who have taken permanent vacancies outside the BMWE bargaining unit shall be required to accept recall only to a permanent position which his seniority permits him to hold within the BMWE bargaining unit on his BST. If an employee refuses to accept such recall he will forfeit all entitlement to ES and will forfeit his seniority within the BMWE.

NOTE 2: In the application of this Article 7.3(b), employees on ES shall be ranked for seniority purposes by cumulative compensated service (CCS) regardless of bargaining unit. Vacancies shall be offered to employees on ES status in all bargaining units, in order of CCS, but only the most “junior” (in terms of CCS) shall be required to Take the position, first at the location, then on the BST, then on the Region.

(c) An employee who has ES under the provisions of this Article and is unable to hold a position in accordance with Article 7.3(a) or (b), shall be required to fill unfilled temporary or seasonal vacancies, on the Region, in positions represented by the BMWE. Reasonable expenses will be paid for vacancies off the BST. Reasonable expenses will also apply to temporary assignments of under 45 days on the BST.

(d) In the application of this Article 7.3, unfilled permanent, temporary or seasonal vacancies shall mean vacancies which occur after all bulletining and recall provisions of the relevant Collective Agreements have been exhausted.

(e) An employee who accepts a permanent vacancy outside the BMWE bargaining unit, but within the Company and is unable to hold work as a result of a Technological, Organizational or Operational or a Material (running trades) Change within five years will revert back to ES under this plan.

Further, article 7.4 provides for the obligation to accept temporary work outside the bargaining unit within the Company as a condition of maintaining ES entitlement, while article 7.5 imposes on employees on ES status an obligation, failing all other possibilities, to take available work outside the Company.

The element of requirement is reiterated in the terms of article 7.6 of the 1995 JSA which provides as follows:

> **7.6** An employee who has ES and who fails to comply with the provisions of this Article 7 will lose his ES. Such employee shall, however, be entitled to such other benefits under this Agreement for which he is eligible.

It would appear arguable that the wording of article 7.2 of the new JSA could be construed in such a manner as to support the view that an employee with ES whose job is abolished is considered as laid off or subjected to layoff. Further, as the ES allowance is something less than full wages, it is also arguable that the employee on ES status is something less than the equivalent of a fully remunerated, active employee. For the purposes of this grievance, however, it is unnecessary to resolve the issue of whether, under this new agreement, an employee on ES status is laid off, or is more "laid off" than was the case previously, as reflected in the **CN– IAM** award examined above.

What is most important for the purposes of this analysis, as it bears on the relationship between article 7.10 (article 7.9 in the 1995 JSA) and article 6.1(d), which are materially unchanged in their language, is that there continue to be onerous obligations on the employee who has the benefit of ES payments, to exercise his or her seniority to protect available work, and to do so in some cases which would require relocation from his or her headquarters or home location. Significantly, it is still within that context that the language of article 6.1(d) must be understood. Very simply, to have an entitlement to relocation expenses, under article 6.1(d) an employee must be subject to the requirement to relocate in accordance with the provisions of article 7 of the JSA. Again, as noted above, it appears to the Arbitrator to be clear that the employee who falls within the provisions of article 7.10, that is an employee whose relocation would cause another employee to assume ES status, is not under an obligation or requirement to relocate "under the provisions of Article 7" within the meaning of article 6.1(d) of the Job Security Agreement. In this respect, there has been no change in language, nor is there any reason to conclude that there has been any change in the bargain.

The Arbitrator has some difficulty understanding how it could be argued that the parties were *ad idem* with respect to the meaning and application of article 6.1(d) in the circumstance of an employee falling under the provisions of article 7.10. As is clear from the material before the Arbitrator, their disagreement as to the obligation to pay relocation expenses for an employee who elects to relocate, although not obliged to do so, was a point of clear disagreement at all times at the bargaining table. The Company refused to agree with the interpretation advanced by the Brotherhood, and ultimately the same language was adopted, on the understanding that the matter would be taken to arbitration for resolution. In that circumstance it cannot be asserted that the parties agreed to an interpretation or a meaning different from that which would have obtained under the identical language provisions of the 1992 Job Security Agreement. For the reasons related above, I am satisfied that the obligation upon the Company to pay relocation benefits under 6.1(d) under that agreement, as under the current agreement, was intended to operate only where the employee is forced to relocate by the operation of the provisions of article 7 of the JSA.

The foregoing conclusion has further support in a purposive examination of the general provisions of the JSA. A review of those provisions reflects a mutual understanding that, as an intrinsic part of the bargain for employment security protection, the Company should be shielded from unnecessary displacements, and the cost which they can occasion. In this regard, it is notable that article 6.1(c) of the JSA, which provides for the payment of relocation expenses to an employee who elects to relocate to assume a bulletined permanent vacancy is entitled to be paid the relocation expenses "... provided this will not result in additional moves being made;". If the Brotherhood were correct in its interpretation of article 6.1(d), that provision could substantially cancel out the protection which the Company has against unlimited additional moves, as intended in the language 6.1(c). On what basis can it be assumed that the parties would have intended that an employee could elect to relocate to take a vacancy, so long as no other moves might be occasioned while, on the other hand, he or she would at the same time be entirely free to elect to relocate, with relocation expenses, thereby occasioning a possible chain of similar additional moves, with further expenses? In the Arbitrator's view the provisions of article 6.1(d) must be read in a manner which is rationally consistent. In my view the interpretation advanced by the Company is more compelling in that regard.

Ultimately, the Brotherhood would interpret article 6.1(d) to provide that the employee is entitled to relocation expenses if he or she is "required to relocate to have work". However, that is not the wording nor is it the intention of

the article. The relocation in question must be in furtherance of a requirement of article 7 or of the Job Security Agreement, i.e. “under the provisions of article 7 of this agreement”. In the result, the Arbitrator is satisfied that the instant grievance cannot be allowed. When regard is had to the evolution of the provisions of the Job Security Agreement, the interrelationship between article 6 and article 7 of that agreement and the language of article 6.1(d), it must be concluded that an employee cannot claim an entitlement to relocation expenses unless that employee is required to relocate, as that requirement is understood within the provisions of article 7 of the JSA. The interpretation advanced by the Brotherhood would effectively read out and render meaningless the words “... under the provisions of article 7 of this Agreement” as they appear in article 6.1(d) of the Job Security Agreement. That is something an arbitrator cannot do, without significantly amending or altering the intention of the parties’ agreement.

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

January 12, 1996

(signed) MICHEL G. PICHER
ARBITRATOR