CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2747

Heard in Montreal, Tuesday, 11 June 1996

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The status of Ms. N.B. Ferguson regarding the Job Security Agreement dated April 29, 1992 and her entitlement to employment security.

COMPANY'S STATEMENT OF ISSUE:

On January 1, 1995 the Company implemented an operational change on the Canadian Atlantic Railway as detailed in the Article 8.1 notice dated August 24, 1994.

As per the notice, all positions were abolished due to the abandonment and/or sale of the Company's holding in the Province of New Brunswick known as CAR.

The grievor's name and the permanent position she was holding were indicated on the Article 8.1 notice dated August 24, 1994.

On or about January 1, 1995, the grievor was informed that although she held a permanent position at the time of the closure of CAR, she was not entitled to the benefits contained in Article 7 of the Job Security Agreement.

The Union grieved and claimed that by exercising her seniority rights in accordance with the Agreement in 1991, Ms. Ferguson reestablished her eligibility for ES status and was therefore entitled to the protections of Article 7.8 of the Job Security Agreement following the abolishment of her position on January 1, 1995. The Union further requested that Ms. Ferguson be compensated for any wages and benefits lost due to the Company placing her on S.U.B.

The Company declined the Union's request.

FOR THE COMPANY:

(SGD.) D. GUERIN
FOR: DISTRICT GENERAL MANAGER, EAST-WEST

There appeared on behalf of the Company:

D. Guérin	– Labour Relations Officer, Montreal
L. S. Wormsbecker	– Manager, Labour Relations, Montreal
D. L. Johnson	– Benefit Plans Officer, Montreal
F. B. DeWitt	– Manager, Administration, Saint John

And on behalf of the Union:

R. Pagé	– Executive Vice-President, Montreal
N. Lapointe	– Assistant Division Vice-President, Montreal

L. Hildebrand – Assistant Division Vice-President, Winnipeg
P. Conlon – Assistant Division Vice-President, Toronto

award of the Arbitrator

The grievor is a long-service employee, having commenced her service with the Company in 1965. It is not disputed, however, that by reason of an operational or organizational change implemented in 1990, her permanent position was abolished and she was then put to her options under the Job Security Agreement. Under the terms of that agreement she was compelled to exercise her maximum seniority to protect work, failing which she would forfeit her employment security. In this regard the agreement provides, in part, as follows:

> **7.3 A BMWE, TCU & CSC System Council No. 11 of the IBEW**
>
> **(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.
>
> ..
>
> **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.

It is common ground that at that time Ms. Ferguson opted not to exercise her full seniority, which she could have done by displacing to a position at McAdam. She declined that opportunity, a choice which was recorded by a memo which she signed, dated February 6, 1990, which reads as follows:

> I do not wish to exercise my seniority to displace a junior employee at McAdam, N.B.
>
> (signed) N. B. Ferguson

In the result the grievor was laid off in Saint John and opted to work as first spare, a position which in fact obtained her close to full time work, until February 19, 1991, at which point she was again awarded a permanent position.

The grievor's new permanent position as export/import clerk was eventually abolished by reason of an article 8.1 notice dated August 24, 1994, pursuant to the Company's decision to cease its operation of the Canadian Atlantic Railroad effective January 1, 1995. The issue now becomes whether she can assert employment security in respect of the abolition of that position.

The Union stresses that the notice provided by the Company on August 24, 1994 contained both the grievor's name and permanent position, a fact which it submits indicates that the Company treated Ms. Ferguson as entitled to employment security in respect of the 1995 closure. It also submits that at the time she made her option not to move to McAdam, N.B. in 1990, the Company did not make clear to her that to pursue that course of action would cause the forfeiture of her employment security entitlement. Alternatively, the Union submits that the forfeiture of employment security under the terms of the Job Security Agreement is not permanent, and that in the instant case the grievor resumed employment security entitlement when she once again obtained a permanent position in February of 1991.

The Company denies that there has been any injustice or violation of the collective agreement in its dealings with the grievor. Firstly, it submits that it is not for the Company to advise employees of their rights and entitlements under the collective agreement or the Job Security Agreement. It stresses that there is nothing in the record to suggest that the grievor was unaware of the consequences of her actions, and advances its own belief that she was in fact alerted by her supervisor, Mr. N.E. Nason, to the fact that she would be forfeiting employment security. The Company further submits that any forfeiture of employment security is permanent, stressing that that fact was recognized by the submission of the Associated Railway Unions to Arbitrator Dalton Larson during the course of an interest arbitration in 1987. The submission of the unions at that time includes, in part, the following statements:

> **6.** If an employee fails to exercise either regular or Employment Security seniority, then they have forfeited their Employment Security forever.

...

> **110.** The Unions are finding that a number of employees at the present time have disqualified themselves from employment security as a result of choosing laid off status or protecting relief work. ...

It submits that the above passage, and others, confirm the understanding of the unions, including the Union in the grievance at hand, that the forfeiture of employment security is permanent.

The Arbitrator has considerable difficulty with the submission advanced by the Union, on the facts as presented. Employment security under the Job Security Agreement in force for the purposes of this grievance is an extraordinary protection, giving to employees with eight years of cumulative compensated service a benefit tantamount to wage protection for life. In exchange for that protection the employee was compelled to protect work to the maximum of his or her seniority bidding rights. Article 7.6 of the Job Security Agreement is very clear that failure to do so results in the forfeiture of the individual's employment security. The article is clear that the employee continues, however, to retain other job security benefits under the agreement. There is nowhere in the language of the Job Security Agreement any indication that an employee can be reinstated to employment security status once it has been forfeited.

It appears to the Arbitrator that it might be arguable, in an appropriate case, that an employee did not make a free election, or acted on some false information or assumption, in making a decision with respect to the exercise of seniority rights so as to raise some question as to whether he or she freely and voluntarily surrendered the important protection of employment security. The case might be argued by analogy to those cases where an employee can prove that his or her resignation was in fact not voluntary, so that the employment relationship is not terminated. In such a case, however, the onus is upon the employee to bring good and sufficient evidence of a state of mind, or other condition, which justifies the conclusion that the election made was in fact not made freely, or in the manner contemplated by the Job Security Agreement. However, as a general rule, ignorance of one's rights or negligence in their exercise will not be sufficient to negate the consequences of an election so made.

In the instant case there is no evidence, whether by way of testimony or written submission, to prove that the grievor was unaware of the consequences of her actions when she opted not to displace a junior employee at McAdam, N.B. in 1990. In these circumstances the Arbitrator is compelled, on the balance of probabilities, to conclude that the case cannot succeed on the basis that the grievor's election was other than conscious and voluntary. Nor can I accept the implicit suggestion of the Union that it was somehow incumbent upon the Company to inform the grievor of the consequences of her choices (*see* **CROA 2227**). This is not a case where the evidence discloses any misleading of the grievor, whether by neglect or by design, on the part of the employer.

In the result, the Arbitrator must find that the grievor did forfeit her employment security, by the choice which she made not to exercise her maximum seniority rights in February of 1990. From that time onwards she no longer had employment security within the meaning of article 7 of the Job Security Agreement. Nor can the Arbitrator find any provision of the Job Security Agreement whereby she can be said to have regained that status.

For the foregoing reasons the grievance must be dismissed.

June 14, 1996

(signed) MICHEL G. PICHER
ARBITRATOR