

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2808

Heard in Montreal, Tuesday, 14 January 1997

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**TRANSPORTATION COMMUNICATIONS UNION**

### **DISPUTE:**

Claim by the Union that the Company violated article 6.1 and article 7.5 of the Special Agreement dated May 1, 1996 when it unilaterally refused to approve work outside of CN at the location for Mr. L. Phair, as referred to the Labour Adjustment Committee by the Union.

### **JOINT STATEMENT OF ISSUE:**

On October 2, 1995 the Union was advised by Canadian National that the CN Roadcruiser bus operation in Newfoundland would be disposed of. All existing positions covered by the collective agreement, Agreement 6.1, would be abolished effective January 1, 1996.

On January 15, 1996 the Union was advised by Canadian National that they were not able to finalize the sale of CN Roadcruiser by January 29, 1996, and would be abolishing the existing positions on February 29, 1996.

In the interim, negotiations for a new collective agreement had been ongoing since 1993 and continued through to 1996.

On May 1, 1996 the Union and the Employer successfully concluded negotiations for a Special Agreement covering employees affected by the closure of Canadian National's Newfoundland operations. The Special Agreement superseded the terms and conditions of the Employment Security and Income Maintenance Plan in effect at the time.

The Special Agreement established a Labour Adjustment Committee (LAC) that would have full and unrestricted power and authority, and exclusive jurisdiction, to deal with and adjudicate upon all matters relative to the Special Agreement.

On June 15, 1996 Mr. Phair elected option 6 (employment security). Mr. Phair was not going to be subjected to relocation outside of Newfoundland, pursuant to article 6 hereof, until October 1, 1996.

On September 30, 1996 the Company agreed to give the employees on employment security, an additional three days starting October 1, 1996, meaning until October 3, 1996, to make their election regarding relocation outside of Newfoundland, pursuant to article 6.

On October 3, 1996 the Company agreed to give the employees on employment security an additional four days starting October 3, 1996, meaning until October 7, 1996, to make their election regarding relocation outside of Newfoundland, pursuant to article 6.

On October 3, 1996 a proposal was put forward by the Union at the LAC to approve work outside of CN for Mr. Phair. The work outside is a position of Sales Representative and the rate of pay is \$6.50 per hour for 40 hours per week.

On October 10, 1996 the Company refused to approve the work outside CN.

The Union considers that Mr. Phair's request to take a position outside of CN was by far reasonable, it should have been approved by the LAC.

The Company refused to approve the outside work requested by the Union at the LAC.

The Labour Adjustment Committee being unable to agree on work outside CNR, the Union is requesting that such grievance be referred to arbitration, in accordance with article 7.6 of the Special Agreement signed on May 1<sup>st</sup>, 1996.

The Union grieved that Mr. Phair is entitled to work outside of CN at the location before being required to relocate outside the location.

The Union grieved that Mr. Phair is entitled to have the salary (work outside of CN) topped off to 100% of his basic weekly pay at CN and that the employment security period will not be reduced by the number of weeks of top-off received.

The Company declined the grievance.

**FOR THE UNION:**

**(SGD.) R. PAGE**  
**EXECUTIVE VICE-PRESIDENT**

**FOR THE COMPANY:**

**(SGD.) R. BATEMAN**  
**FOR: DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Company:

- D. S. Fisher – Director, Labour Relations, Montreal
- S. Grou – Labour Relations Officer, Montreal

And on behalf of the Union:

- P. Conlon – Assistant Divisional Vice-President, Toronto
- D. J. Bujold – National President, Ottawa
- R. Pagé – Executive Vice-President, Montreal
- N. Lapointe – Assistant Divisional Vice-President, Montreal
- W. Greenland – Local Chairman, St. Johns

**AWARD OF THE ARBITRATOR**

This grievance arises under the disputes procedure contained within the special agreement concerning the closure of Newfoundland operations, a document dated May 1, 1996. That agreement provides, among other things, for the obligations of employees in respect of the protection of their employment security. Article 6 provides, in part, as follows:

**6.1** An employee who has eight or more years of cumulative compensated service, and commenced service prior to January 1, 1994, will be required, on a continuous basis, to do the following in order to become and remain eligible for the benefits contained in this article 6.

- (a) accept work outside of CN at the location as determined by the Labour Adjustment committee; or
- (b) fill unfilled permanent vacancies in any bargaining units, non-scheduled or management positions at the location, region, system.

**NOTE:** In the application of sub-paragraph 6.1(b), employees will be required to fill such unfilled positions in inverse order of seniority.

**6.2 (a)** Prior to an employee being required to fill a permanent vacancy outside Newfoundland pursuant to article 6.1, the Labour Adjustment Committee will meet and review whether any alternatives are available.

(b) Relocation benefits will be triggered only when permanent vacancies are filled.

(c) Any outside earnings an employee was receiving prior to the date of the notice of permanent job abolishment will not be deducted from benefits received under this article. In all other cases, outside earnings will be deducted.

Article 7 of the Special Agreement establishes the Labour Adjustment Committee, comprised of two Company officers and two Union representatives. The parts of article 7 pertinent to this dispute are the following:

**7.1** The Labour Adjustment Committee shall consist of two Company officers and two Union representatives. The Committee shall be co-chaired by the senior Company officer or designate and by the National President of the Union or designate.

**NOTE:** If the Union representatives are other than full time salaried representatives of the Union, compensation for actual wages lost and reimbursement for actual, reasonable expenses incurred in attending to Committee matters will be borne by the Company.

**7.2** The Labour Adjustment Committee shall have full and unrestricted power and authority, and exclusive jurisdiction, to deal with and adjudicate upon all matters relative to this Special Agreement which do not add to, subtract from or modify any of the terms of this Special Agreement.

**7.3** The Labour Adjustment Committee shall not have any power to deal with and adjudicate upon any benefits not specifically provided for in this Special Agreement nor in any subsequent agreement reached between the Company and the Union.

...

**7.6** Except as otherwise provided in this Special Agreement, should the Labour Adjustment Committee be unable to agree on any question submitted relative to the provisions and benefits contained herein, the Union or the Company may request that such question be referred to arbitration in the Canadian Railway Office of Arbitration in accordance with the rules of that Office.

**7.7** The arbitrator shall hear the dispute within 30 days from date of the request for arbitration and shall render the decision together with reasons therefor in writing within 30 days of the completion of the hearing.

**7.8** The arbitrator shall have all of the powers of the Labour Adjustment Committee as set out herein. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Special Agreement. The decision of the arbitrator shall be final and binding.

The Labour Adjustment Committee was unable to agree as to whether the grievor, Mr. L. Phair, should properly be approved to work in an outside truck and automotive sales and service operation, with wages topped up by the Company in accordance with the Special Agreement, rather than be compelled to accept a transfer to a vacant carman's position at MacMillan Yard in Toronto.

The grievor, who is now forty-four years old, was first hired by the Company in 1971. The material before the Arbitrator establishes that following the closure of the Company's railway operations in Newfoundland Mr. Phair continued to be employed principally in the Company's truck fleet maintenance operations, as well performing some functions in respect of pallet control. The Union's representative, who has direct knowledge of the grievor's work history, relates that although Mr. Phair was carried on the payroll as a seller of CN Roadcruiser bus tickets, he in fact performed relatively short and intermittent service in that capacity. The representations of the Union, which are rebutted by any direct evidence from the Company, establish that approximately 80% of Mr. Phair's work for the Company over the last five years has involved truck fleet maintenance. On that basis the Union submits that the work performed by the grievor outside the Company is compatible with Company related functions and skills, and is deserving of approval as acceptable work outside of CN at the grievor's location, as would be determined by the Labour Adjustment Committee.

The Company submits that certain guidelines should be brought to bear in determining what is appropriate alternative employment outside the Company, for the purposes of article 6 of the Special Agreement. Firstly it maintains that the outside job should be similar to the employee's job at CN, or be one that would allow the employee to acquire skills pertinent to future Company service. It states that in that circumstance it would approve the work in question, regardless of the wage rate and, indeed, even if the above criteria were not met, that it would nevertheless approve a proposed job if it paid at least 50% of the employee's CN wage rate.

On the basis of the foregoing, it appears to the Arbitrator that the outside employment obtained by Mr. Phair would fit within the Company's own guidelines. It appears clear to the Arbitrator that the work which he is now performing for a truck and automotive parts and service business is closely related to much of the work which he performed for CN since the closure of its Newfoundland rail operations, principally in the field of truck fleet maintenance. While it is true that in these circumstances, given the salary earned by Mr. Phair in his position of area sales representative, there is a substantial burden of top-up placed upon the Company, I am not inclined to refuse it where, as is evident on the material before me, the grievor's own circumstances bring him within the Company's guidelines. It appears that this matter progressed to arbitration largely by reason of the belief of Company officers, based on payroll documentation, that Mr. Phair's day-to-day work in his most recent years with the Company in fact consisted of the sale of bus tickets. Unfortunately, that matter was not clarified as the parties apparently failed to have any productive communication in the form of a specific Labour Adjustment Committee meeting to deal with the merits of his application.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares, in accordance with the jurisdiction accorded under article 7.8 of the Special Agreement, that the position of Area Sales Representative with O.P. Sales Ltd. is approved, subject to the grievor accepting the following condition. Mr. Phair must accept that should he continue in the position in question to the point of his eligibility for retirement, a status which he must maintain in good faith, he shall retire upon the first opportunity of eligibility. That condition is attached to this decision in view of the representation of the Union's representatives to the effect that it is part of the understanding of the parties, with respect to the ongoing administration of the Special Agreement, and as it appears to the Arbitrator to represent a fair compromise, so as to protect the Company from an open-ended burden of wage top-up payments which could otherwise extend for decades.

This matter is remitted to the parties for implementation in a manner consistent with the terms of this award. Should the parties be disagreed as to any aspect of the details of implementation, the matter may be further spoken to.

January 20, 1997

**(signed) MICHEL G. PICHER**  
ARBITRATOR