CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2827

Heard in Montreal, Thursday, 13 February 1997

concerning

INTERLINK FREIGHT SYSTEMS INC.

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Claims on behalf of J-F Pineault and J. Imbeault concerning the Job Security Agreement.

FOR THE UNION:

(SGD.) D. DUNSTER
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
B. F. Weinert	– Director, Employee Relations, Toronto
B. D. Neill	– Vice-President, Human Resources, Toronto

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
D. Dunster	– Executive Vice-President, Ottawa
D. J. Bujold	– National President, Ottawa
J. J. Boyce	– National President (ret'd), North Bay
R. Nadeau	– Division Vice-President, Quebec

AWARD OF THE ARBITRATOR

This matter concerns two grievances in respect of employees Jacqueline Imbeault and Jean-François Pineault for weekly layoff benefits under article 2 of the Job Security Agreement. Before proceeding to the merits of the issue raised, the Arbitrator first determines that the claim of Mr. Pineault cannot succeed. The parties do not dispute that Mr. Pineault was an unassigned employee working on an on-call basis. He was not, in the circumstances, laid off and cannot, in the Arbitrator's view, claim the benefit of the lay off protections of article 2 of the Job Security Agreement.

The issue remains one of substance, as relates to the layoff of Ms. Imbeault. The position of the Company is that article 2 of the Job Security Agreement applies only in the circumstance of a technological, operational or organizational change, and that it has no application in a lay off which is occasioned by a simple reduction in the amount of available work or a downturn in business. The Union submits that there is no such intention reflected in the language of the Job Security Agreement, or indeed in the question and answer portion appended to the agreement for the benefit of employees. While the Company does not dispute that the language, on its face, would support the interpretation of the Union, it argues that the parties have effectively abandoned the application of article 2 of the Job Security Agreement in all situations other than technological, operational or organizational changes. In other words, in the Company's submission, employees who are laid off in the circumstance of technological, operational or organizational change are entitled to weekly lay off benefits, while employees who are laid off for other reasons, such as a downturn in business, have no protections under article 2.

It is not disputed that the Job Security Agreement takes its roots in similar job security agreements negotiated within the railway industry, and transferred, with some minor adjustments, to apply to the predecessor trucking company, Canadian Pacific Express and Transport. In the railway industry provisions comparable to article 2 of the Job Security Agreement have consistently been applied to employees who are laid off by reason of a downturn in business, and have not been linked to the requirement of a technological, operational or organizational change such as provided for separately under article 5 of the instant Job Security Agreement.

The Company's position is perhaps best explained in the following memorandum of Mr. Brent D. Neill, its Vice-President, Human Resources:

> In August 1979, a large number of layoffs resulted when not all of the employees were recalled to work upon settlement of a strike by the employees of CP Express. Employees who were not recalled to work filed claims for Job Security Agreement Layoff benefits under the terms of the Job Security Agreement in effect at that time, claiming they were entitled to benefit payments due to the lack of work. CP Express had a history of paying layoff benefits to employees unable to work under these circumstances.
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> Once the Company returned to normal, meetings were held between the parties signatory to the Collective Agreement, Don Smith (Vice President, Labour Relations CP Express) and Jack Boyce (General Chairman, BRAC). Don Smith advised Mr. Boyce that the practice of paying Job Security Agreement layoff benefits to employees unable to work due to a lack of business was cost prohibitive and, in the opinion of the Company, was never intended to cover this type of layoff and that effective immediately, the Company would no longer honour claims for employees laid off under these circumstances. To the best of my recollection, Mr. Boyce did not agree to Don Smith's comment. The statement made by Don Smith to Mr. Boyce was never confirmed in writing, however, the agreement was applied in this manner from that time onward. Throughout the 1980's there were numerous claims filed for layoff benefits from employees who were unable to work due to a lack of business, however, these claims were rejected and no grievances were ever filed.

At the arbitration hearing Mr. Neill elaborated on the above memorandum. He indicated that during the 1980's when there was a single payroll system for the Company across Canada administered from Toronto, with which he was involved, claims such as those which are the basis of this grievance were not paid. It appears, however, that subsequently, in the 1990's, with the decentralizing of the payroll function to both Montreal and Vancouver, a degree of inconsistency in the Company's practice emerged, as claims for weekly layoff benefits in circumstances of business downturn were paid both in Quebec and Western Canada.

In further support of its interpretation, the Company directs the Arbitrator to article 32 of the collective agreement which reads, in part, as follows:

> **ARTICLE 32 – JOB SECURITY**
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> **32.1** Technological, operational or organizational change shall be in accordance with the supplemental agreement between the Company and the Organizations signatory thereto effective April 26, 1979, and further revised August 22, 1985, and further Supplements agreed to.
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> **32.2** The provisions of this Agreement are intended to assist employees affected by any change as outlined in 32.1 to adjust the effects of such change. Sections 150, 152 and 153, Part V of the Canada Labour Code do not apply.

Counsel for the Company submits that the above language in the collective agreement is consistent with the employer's view that all parts of the Job Security Agreement are intended to apply only in the circumstance of technological, operational or organizational change.

Upon a review of the totality of the evidence and the submissions of the parties, the Arbitrator is left with substantial difficulty in respect of the Company's position. Firstly, there is no dispute that in its origins article 2 of the Job Security Agreement was intended to apply, and did apply, for the benefit of employees who found themselves laid off for reasons other than technological, operational or organizational change. Secondly, as reflected in the very candid memo of Mr. Neill, when, in 1979, Mr. Smith attempted to assert a very different interpretation of the application of article 2, consistent with the position taken by the Company today, Mr. Boyce on behalf of the Union categorically disagreed. In fact, Mr. Boyce, who was in attendance at the hearing, states that he can recollect

no such conversation whatsoever. By either interpretation, there was plainly no acquiescence on the part of the Union in the interpretation of Mr. Smith in the meeting said to have occurred in late 1979.

Can it be said that there has been a practice by the Company, accompanied by a consistent acquiescence on the part of the Union which indicates either that the Union shared the interpretation of the Company or, alternatively, that it must be estopped from making the claim which underlies this grievance? It is well established that for past practice to be binding in the sense argued by the Company there must be a consistent and open practice which responsible officers of the Union knew, or reasonably should have known, was ongoing. (*See,* **John Bertram & Sons Ltd.** *(1967), 18 L.A.C. 362 (Weiler).*)

In the Arbitrator's view that standard was not met in this case. Firstly, it is common ground that over a substantial number of years the Company has experienced a very high number of terminal closures and related layoffs occasioned by article 5 notices due to technological, operational and organizational changes. There has, in other words, been a substantial number of employees who have received benefits under the Job Security Agreement, including weekly layoff benefits, within that context. Further, as is not denied by the Company, in both Quebec and Western Canada employees have had the benefit of the weekly layoff provisions of article 2 when laid off by reason of a downturn in business. Perhaps most significantly, there is simply no evidence before the Arbitrator to confirm that officers of the Union holding a responsible position with respect to the administration of the collective agreement were ever made aware that employees laid off by reason of a downturn in business were being denied the protections of article 2 of the Job Security Agreement. Further, as related by the Union's representatives at the hearing, in many instances employees laid off in a business downturn during the two decades in question might well be the junior most employees within a terminal, with less than two years' service, who could not in any event claim weekly layoff benefits under article 2. In the result, the practice is mixed and clouded, at best.

What then does the totality of the evidence disclose? Firstly, as is conceded by the Company, the language of article 2 of the Job Security Agreement, and the contents of the Question and Answer segment of the agreement would clearly support the interpretation of the Union. There is no dispute that similar parent provisions have been administered as the Union would have it, consistently, within the railway industry. Secondly, there is no agreement in writing to sustain the interpretation of the Company. Indeed, as the memorandum of Mr. Neill confirms, there was never any oral agreement or indication of any acquiescence by any Union officer. On the contrary, if Mr. Neill's recollection is correct, Mr. Boyce plainly did not agree with the proposed interpretation advanced by Company representative Don Smith in 1979. Thirdly, the Company cannot point to a clear and untrammelled past practice of a quality which would have put the Union on notice as to the employer's interpretation and application of article 2 of the Job Security Agreement. To the extent that many laid off employees would, because of their lack of seniority, not be eligible for benefits, the shortage of claims or grievances over the years is certainly less than conclusive as to the extent of the Union's knowledge or understanding. Further, the evidence discloses a mixed practice at best, as claims were allowed in a number of occasions in Quebec and Western Canada. On the evidence presented the Arbitrator cannot find, on the balance of probabilities, that the Union's officers knew, or reasonably should have known, of the interpretation and application of article 2 which governed the Company's actions since the early 1980's so as to establish either an acquiescence or an estoppel.

In the result, the Arbitrator must sustain the interpretation advanced in these proceedings by the Union with respect to the application of article 2 of the Job Security Agreement. It was plainly intended in its origins to be available to employees laid off for reasons other than technological, operational or organizational change. Ms. Imbeault plainly falls within that circumstance, and was therefore entitled to weekly layoff benefits following her layoff.

The grievance is therefore allowed. The Arbitrator directs that Ms. Imbeault be compensated for all monies lost by reason of the violation of article 2 of the Job Security Agreement by the Company. Should there be any dispute as to the quantum of compensation the matter may be spoken to.

February 14, 1997

(signed) MICHEL G. PICHER
ARBITRATOR