CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2891

Heard in Montreal, Wednesday, 15 October 1997 and Tuesday, 9 December 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. L. A. Waller for weekly lay-off benefits from January 2, 1991 until his recall from layoff.

EX PARTE STATEMENT OF ISSUE:

On January 2, 1991, the grievor was laid off from his position as Gang Welder in the Atlantic Region. Upon lay-off, he applied for weekly lay-off benefits pursuant to article 4 of the ESIMP. His application was rejected on the basis that, according to the Company, junior employees were still working on his Job Security Eligibility Territory. The Company admits that in previous years the grievor did received weekly lay-off benefits under identical circumstances.

The Union contends that: **1.)** Because of colour blindness, the grievor is medically restricted to work as a Gang Welder. **2.)** Since there is no position to which the grievor could exercise his seniority in his basic of job security territories, he was entitled to receive benefits as outlined in article 4 of the ESIMP. **3.)** The Company is in breach of article 4 of the ESIMP and all applicable provisions of the collective agreement.

The Union requests that the Company pay the grievor job security lay-off benefits for the period from January 2, 1991 until his recall to work.

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

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

M. Stock	– Labour Relations Officer, Toronto
G. Search	– Assistant Manager, Labour Relations, Toronto
D. Laurendeau	– Human Resources Associate, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg
J. Dutra	– General Chairman, Winnipeg
D. Brown	– General Counsel, Ottawa

The hearing in this matter was adjourned to December 1997 by the Arbitrator.

On Tuesday, 9 December 1997, there appeared on behalf of the Company:

J. Coleman	– Counsel, Montreal
M. Stock	– Labour Relations Officer, Toronto
G. Search	– Assistant Manager, Labour Relations, Toronto

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg
R. Phillips	– General Chairman, Winnipeg
J. Dutra	– General Chairman, Winnipeg
D. Brown	– General Counsel, Ottawa

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. The grievor, Mr. L.A. Waller, worked for the Company from August 2, 1954 until his retirement in 1995. In 1983 the grievor was diagnosed with colour blindness. That finding resulted in his medical restriction, as he did not meet the vision standard established by the **Canadian Transport Commission**, General Order 0-9. Full vision acuity in respect of colour is federally established as an occupation requirement for welders and welder helpers working in the maintenance of way department.

To accommodate the grievor's colour blindness the Company allowed him to work as a welder, restricted to gangs of three or more employees. As a result, from 1983 through 1991, the period which is the subject of this grievance, Mr. Waller was assigned seasonal work as a welder, generally from March or April through January. It does not appear disputed that over a period of some eight years, upon the grievor's layoff at the end of the work season, the Company treated him as eligible for weekly layoff benefits under article 4 of the ESIMP. However, upon the grievor's layoff at the end of the 1990 working season, effective January 2, 1991, the Company denied the grievor such benefits. Mr. Waller was recalled to work on April 8, 1991. The grievance, therefore, is in respect of the failure to provide to him job security weekly layoff benefits under article 4 of the ESIMP.

At the first hearing of this matter, the Brotherhood's brief revealed, apparently for the first time, the bargaining agent's intention to assert the provisions of the **Canadian Human Rights Act**, alleging that the grievor was the victim of discrimination in respect of the Company's denial of layoff benefits to him. The Company's representatives protested against the raising of that issue, asserting that they did not come prepared to deal with it, and that it was not, in any event, identified for arbitration within the *ex parte* statement of issue filed by the Brotherhood. As the employer's representatives were not fully prepared to argue that submission, the Arbitrator adjourned the proceedings to allow the fuller development of submissions in that regard.

Upon the continuation of the hearing, Counsel for the Company made extensive submissions with respect to the arbitrability of the Brotherhood's claim that the grievor was dealt with in a manner contrary to the **Canadian Human Rights Act**. Upon a review of the submissions of the parties on that point, the Arbitrator is of the view that the Company is correct in its assertion that, in the context of this specific grievance, that issue is not arbitrable.

The Canadian Railway Office of Arbitration functions under a long-established memorandum of agreement, first executed on January 7, 1965, as a framework for the progressing of grievances to arbitration by a number of railroads and unions which comprise the Office. That memorandum provides, in part, as follows:

> **4.** The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
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> > **(A)** disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and
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> > **(B)** other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration for final and binding settlement by arbitration;

but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this Agreement.

5. A request for arbitration of a dispute shall be made by filing notice thereof with the Office of Arbitration not later than the eighth day of the month preceding that in which the hearing is to take place and on the same date a copy of such filed notice shall be transmitted to the other party to the grievance. A request for arbitration respecting a dispute of the nature set forth in Section (A) of Clause 4 shall contain or shall be accompanied by a Joint Statement of Issue. A request for arbitration of a dispute of the nature referred to in Section (B) of Clause 4 shall be accompanied by such documents as are specifically required to be submitted by the terms of the collective agreement which governs the respective dispute. On the second Tuesday in each month, the Arbitrator shall hear such disputes as have been filed in his office, in accordance with the procedure set forth in this Clause 5. …

…

8. The joint Statement of Issue referred to in Clause 5 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours' notice in writing to the other may apply to the Arbitrator for permission to submit a separate statement and proceed to a hearing. The Arbitrator shall have the sole authority to grant or refuse such application.

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12. The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions. His decision shall be rendered, in writing together with his written reasons therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.

The decision of the Arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

(emphasis added)

As can be determined from the foregoing, the jurisdiction of the Arbitrator is, by the agreement of all parties signatory to the memorandum, to be restricted to those "disputes or questions contained in the joint statement submitted to him by parties or in the separate statement or statements as the case may be,". In the case at hand the Brotherhood has submitted an *ex parte* statement of issue. On its face it make no reference to a violation of the **Canadian Human Rights Act**. Counsel for the Brotherhood submits, however, that the issue is properly before the Arbitrator by reason of item 3 of paragraph 2 of the statement of issue which states "The Company is in breach of article 4 of the ESIMP and **all applicable provisions of the collective agreement**. (emphasis added) Counsel seeks to apply the final phrase in the above sentence to assert an alleged violation of article 18.6 of the collective agreement which, he maintains, allows an employee to bring to arbitration a claim that he or she "has been unjustly dealt with". Counsel submits that that phrase is sufficiently broad to incorporate a violation of the **Canadian Human Rights Act**, and that there has therefore been compliance with the procedural requirements established in clause 12 of the memorandum of agreement establishing the Canadian Railway Office of Arbitration.

The Arbitrator cannot accede to that submission, on a number of grounds. Clauses 8 and 12 of the memorandum of agreement obviously reflect the agreement of the parties that the procedures of the Office should ensure that there be specificity, well in advance of the hearing, with respect to the identification of contractual or legal issues to be pleaded and resolved. To that end, clause 5 requires that a joint statement, or an *ex parte* statement, be filed not later

than the eighth day of the month preceding the month in which the hearing of the grievance is to take place, with a copy to be provided to the opposite party.

The procedural issue before the Arbitrator in the instant dispute is whether the phrase "all applicable provisions of the collective agreement" satisfies the requirement of clause 8 of the memorandum of agreement. I do not see how it can. That provision is specific, and expressly requires that the joint statement of issue, and by extension the separate statement of issue referred to in the following paragraph, are to contain "reference to the **specific** provision or provisions of the collective agreement where it is alleged that the collective agreement has been misinterpreted or violated." Nothing, in my view, could be less specific than the general reference to "all applicable provisions of the collective agreement" found in item 3 of paragraph 2 of the *ex parte* statement of issue, which is before me in the case at hand. That expression is obviously not sufficiently particular to bring the Brotherhood's allegation of a violation of article 18.6 of the collective agreement properly before the Arbitrator, in the sense contemplated by clause 12 of the memorandum of agreement. To put the matter differently, I am limited in my jurisdiction to the matters clearly and specifically outlined in the *ex parte* statement of dispute filed, and as article 18.6 is plainly not one of those, neither it, nor the related allegations concerning the **Canadian Human Rights Act** are properly arbitrable.

The above conclusions are made without addressing the separate question of whether, in any event, an allegation in respect of a violation of article 18.6, which asserts that an employee has been unjustly dealt with, is of itself arbitrable, in any event. Counsel for the Company submitted in argument that the employer takes the position that such an allegation would not be arbitrable, in light of the recent decision of the Quebec Court of Appeal in case no. 500-09-002128-924, dated February 5, 1997. It may well be that the decision of the Court does return the issue of the arbitrability of an allegation that an employee has been "unjustly dealt with" to square one, for full and proper determination by this Office in an appropriate case (*see* ***CROA 924, 2157, 2284, 2363, 2768*** *and see also* ***Re CN Telecommunications*** *(1976) 11 L.A.C. (2d) 152 (Rayner) and* ***Re Hydro Electric Power Commission of Ontario*** *(1975) 8 L.A.C. (2d) (Adams)*). However, that is not a matter upon which I need pronounce myself further for the purposes of this award. For the reasons related above, I am satisfied that I am without jurisdiction to deal in this case with the allegation of the Brotherhood to the effect that the grievor was the victim of discrimination contrary to the **Canadian Human Rights Act**. That finding is, moreover, obviously without prejudice to the right of the grievor to seek vindication of his statutory rights in another forum.

I turn, then, to consider the alternative submission of the Brotherhood, which is properly before me, to the effect that the grievor was denied layoff benefits, to which he was entitled under article 4 of the ESIMP. It appears that this aspect of the Brotherhood's grievance stems, in part, from the decision of this Office in a prior grievance brought on behalf of Mr. Waller, in which it was claimed that he should be entitled to exercise consolidated seniority as provided in the ESIMP. That issue, resolved in **CROA 2764**, found that the grievor was not so entitled. In the award, however, the following passage appears:

> In the Arbitrator's view the grievance cannot succeed. Firstly, if in fact the grievor was a seasonal worker, a conclusion which can be assumed for the purposes of this analysis, he would, by virtue of article 10.1 of the ESIMP be limited to rights under articles 4 and 8 of the Plan. In other words, his protections would be limited to the weekly layoff benefits provided under article 4 and rights negotiated on behalf of employees under the terms of article 8, including maintenance of basic rates. The Brotherhood has provided the Arbitrator with no indication of how he could, under those provisions, claim the full protections of employment security, including the right to assert consolidated seniority, a right which arises in the application of article 7 of the ESIMP.

For the purposes of this grievance it is not disputed that the grievor was a seasonal worker, or that article 10.1 of the ESIMP gave him and other seasonal workers rights under articles 4 and 8 of the Plan. The submission of the Company, however, is that he is nevertheless disqualified from layoff benefits. It argues that Mr. Waller was not in fact unemployed because he was laid off, but rather because he had a physical limitation which placed him in the position of being in fact on a medical or disability leave. Implicit in the Company's submission is that the contrary treatment of Mr. Waller in some eight previous years was an error on the part of the Company.

In support of its position the Company cites the decision of this Office in **CROA 2533**. That case, which concerned CP Express & Transport, involved a claim by the Transportation Communications Union that an employee had been improperly denied weekly layoff benefits under the supplemental Job Security Agreement. The

Company argued that in fact the employee was absent solely by virtue of her medical condition, and not because of any lack of work which she could otherwise obtain by the application of her seniority. The grievance was denied, and the following reasoning appears in the award:

> … Essentially, the position of the Company is that the grievor's loss of work was not occasioned by a layoff because of a reduction in the work force, but because of her physical disability which prevented her from holding available work in the warehouse.
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> A review of the history of the Job Security Agreement between the parties sustains the approach adopted by the Company with respect to the payment of the weekly layoff benefits provision found in article 2 of that agreement. Specifically, the Company's position is confirmed in a decision of the Joint Administrative Committee in respect of a railway employee made on January 29, 1969 and is further confirmed in two subsequent decisions of Arbitrator Weatherill sitting as a referee under the terms of the Job Security Agreement (awards dated January 16, 1978 and May 1, 1978).
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> In the award dated January 16, 1978, Arbitrator Weatherill found that an employee who did not exercise his seniority to displace another employee, by reason of a heart condition, was not entitled to the weekly layoff benefits under article 2 of the Job Security Agreement. At pp 6-7 of his award Arbitrator Weatherill commented as follows:
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> > The grievor was entitled, as we have seen, to sickness benefits, and he received such. When those expired, it was still open to him to exercise his seniority, but he did not do so, his physical condition (angina pectoris) remaining. It may be concluded, for the purposes of this award, that the grievor was physically unable to perform the work which would have been available to him had he exercised his seniority rights. It is, therefore, quite understandable that the grievor would not exercise seniority rights to claim such work. It does not follow, however, that the grievor was therefore relieved of the necessity of meeting the requirements of article 1 of Appendix B of the Job Security Agreement in order to obtain benefits thereunder.
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> > Article 1(e) of Appendix B of the Job Security Agreement requires that an employee, to be eligible for benefits, have exercised full seniority rights on his basic seniority territory. There is no qualification for that requirement, and the grievor did not meet it. While the grievor's sickness makes his conduct understandable, it does not relieve him of the necessity of meeting the eligibility requirements. Indeed, as is clear from article 4(a) of Appendix B, employees absent by reason of sickness or injury are not to be regarded as laid off, and so are not eligible for job security benefits. An employee in the grievor's position, then, simply does not come within the scope of the Job Security Agreement. The arbitrator, of course, has no power to add to, subtract from or modify any of the terms of the agreement.
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> > In the circumstances of this case, then, it cannot be said that the grievor was eligible for job security benefits under the terms of the Job Security Agreement. Accordingly, the grievance must be dismissed.

Insofar as the bargaining relation of the parties is concerned, the Arbitrator is compelled to conclude that the interpretation of the Job Security Agreement which has been followed by the Company in the case of Ms. Lawrence is one which was originally agreed and understood between the parties, which received arbitral sanction and which has continued without amendment to the present time. I am satisfied that at all material times, upon the renewal of the collective agreement and the Job Security Agreement after the Weatherill awards, the Union must be taken as having accepted the established application and interpretation of these provisions. Insofar as the collective agreement and Job Security Agreement are concerned, therefore, the Arbitrator cannot find any violation on the part of the Company. Its view that the grievor's inability to hold employment was not the result of a layoff, but rather the result of a physical disability, must be sustained.

From the standpoint of strict interpretation, the Arbitrator is of the view that the foregoing jurisprudence correctly states the principles which would normally govern to resolve this dispute. In other words, the Company's interpretation of the application of article 4 of the ESIMP is correct, and indeed has been confirmed on more than one occasion by this Office. There was work in the grievor's classification which, at the time of his layoff, his seniority would have obtained for him. He was not, therefore, laid off by virtue of a lack of work, but was, rather, absent or on leave because of a physical disability. Whether that analysis would withstand scrutiny under the **Canadian Human Rights Act** is, for the reasons related above, not an issue properly before me.

In the instant case, however, it is the Arbitrator's view that this is a situation which can fairly be said to call into play the principles of estoppel. Over a substantial number of years the grievor was given the advantage of weekly layoff benefits under article 4 of the ESIMP, obviously with the full knowledge of the responsible officers of the Company. It is not unreasonable to assume that over that period of time he would have been induced to structure his financial arrangements in anticipation of the payment of such amounts. Significantly, in my view, the payments continued over a period of time which spanned the renewal of the collective agreement, on more than one occasion, without any indication to the grievor, or to his bargaining agent, that the Company might invoke a contrary interpretation. In the result, it would be inequitable to now allow the Company, in the case of Mr. Waller, to invoke the strict interpretation of the collective agreement as it now seeks to do. This is a circumstance which, in my view, does justify the application of the principles of estoppel. The treatment of Mr. Waller over a period of some eight years constitutes a representation on the part of the Company that it would not, in his case, apply the strict terms of the collective agreement or the ESIMP in accordance with **CROA 2533**. Having taken that approach, it could not equitably revert to the strict application of its rights on the occasion of the grievor's layoff in January of 1991.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be compensated for all wages and benefits lost from the period from January 2, 1991 until his recall from that layoff. However, given the limitations placed upon the Arbitrator by the framework of the Brotherhood's *ex parte* statement of issue, compensation is to be limited to the period so defined. In any event, apart from that limitation, it would appear that in years subsequent to 1991 the Brotherhood was on notice from the Company as to its intention to hold to the strict interpretation of the grievor's rights, so that no claim of injurious reliance could be made thereafter.

December 19, 1997

(signed) MICHEL G. PICHER
ARBITRATOR