# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2935

Heard in Montreal, Tuesday, 10 March 1998

concerning

## CANADIAN NATIONAL RAILWAY COMPANY

and

## CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

## EX PARTE

### DISPUTE — COUNCIL:

Entitlement to early retirement opportunities.

### DISPUTE — COMPANY:

Arbitrability of the Council's issue on entitlement to early retirement opportunities.

### COUNCIL'S STATEMENT OF ISSUE:

In the last few years, the Company and the Union have negotiated several Agreements which contained early retirement opportunities for our members. There have been several employees who bid such early retirement opportunities and their applications have been rejected by the Company. The reason the Company declined such applications is because these employees were not in active service.

The Union appealed the Company's decision on the grounds that such action by the Company was discriminatory and violated the human rights of the employee.

The Company declined the Union's appeal.

### COMPANY'S STATEMENT OF ISSUE:

On July 29, 1995, the Council wrote to the Company requesting that the Company review their position on early retirement opportunities and advise the Council accordingly.

On September 23, 1996, the Company responded to the Council's correspondence stating that only employees in the active work force are eligible for early retirement opportunities.

On April 16, 1997, the Council proposed to the Company a Joint Statement of Issue.

On May 16, 1997 the Company wrote to the Council to advise them that the Company considered this issue not arbitrable in consideration of the following:

1. The issue had not been properly submitted as a grievance.

2. The issue does not concern an interpretation or alleged violation of the collective agreement.

It is the position of the Company that the issue as presented by the Council is not arbitrable.

**FOR THE COUNCIL:**

**(SGD.) N. MATHEWSON**
**for: GENERAL CHAIRPERSON**

**FOR THE COMPANY:**

**(SGD.) A. E. HEFT**
**for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

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|---|---|
| A. E. Heft | – Manager, Labour Relations, Toronto |
| D. C. McDonnell | – Senior Counsel, Montreal |
| G. Search | – Assistant Manager, Labour Relations, Toronto |

And on behalf of the Council:

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|---|---|
| M. P. Gregotski | – General Chairperson, Fort Erie |
| R. Beatty | – Vice-General Chairperson, Hornepayne |
| G. Marsh | – Local Chairperson, Brockville |
| R. Dyon | – General Chairman, BLE, Montreal |

## AWARD OF THE ARBITRATOR

The Company objects to the arbitrability of this matter. The Council challenges the practice of the Company to decline to offer early retirement incentives to employees who are not in active service, when such incentives become available under the terms of an agreement negotiated pursuant to a material change. The document which originated the dispute, and which the Council relies on as the originating document of grievance, is in the form of a letter dated July 29, 1995 addressed to the Company's Senior Vice-President, CN East, Mr. K.L. Heller from General Chairperson M.P. Gregotski. It reads as follows:

> 29 July 1995
>
> …
>
> As you are aware in the past and presently, the Company has denied Early Retirement Opportunities to employees who were not in active service. This issue has been discussed between the parties and presently is not resolved.
>
> It is the position of this office, that any employee who meets the qualifications should be afforded the Early Retirement Opportunity.
>
> The Company has taken the position that an employee must be in active service to be afforded an Early Retirement Opportunity. In our view this is a discriminatory action by the Company and is in violation of the Human Rights Act.
>
> We respectfully request that the Company review their position on this matter and advise accordingly.

By letter dated September 23, 1996 the Company's Human Resources representative, Ms. P. Marquis responded, in part, as follows:

> 23 September 1996
>
> …
>
> As stated in the Union's correspondence, it has long been the Company's position and practice, that an employee must be in active service to be afforded an early retirement opportunity. The rationale behind early retirement opportunities is to promote attrition through particularly attractive separation packages to the senior employees in the work force. This practice is beneficial in addressing adverse effects brought about by some major change. In order to minimize those effects on junior employees and provide for their continued active working status, the Company will offer enhanced packages to the senior employees. Thus the work force is reduced from the top of the spectrum allowing the junior employees to maintain work. If retirement opportunities were offered to those employees not in active service, the agreement to early retirement opportunities would be totally contrary to the intent of what early attrition is meant to accomplish.

This position is supported by arbitral jurisprudence in particular AH-319 wherein the Arbitrator stated:

> Upon a plain reading of the foregoing provisions [material change article] the arbitrator must agree with the Company that the purpose of the article is to provide notice and certain protections to locomotive engineers who may be adversely affected by a material change in working conditions initiated by the Company. Plainly, the purpose of the provision, is not to bestow windfall benefits on employees who, in fact, have suffered no adverse consequences on the occasion of a material change.

Shortly thereafter the Council addressed a letter to Mr. Heller, dated November 3, 1996 seeking the Company's participation in a joint statement of issue to be forwarded to the Canadian Railway Office of Arbitration. No objection appears to have been taken by the Council to the delay of over a year to the Company's response.

The Company takes the position that no individual grievance, and no policy grievance, identifying any provision of the collective agreement was ever communicated to the Company, and that the matter is therefore not appropriate for resolution at arbitration. It representative points to paragraph of the memorandum of agreement of September 1, 1971 establishing the Canadian Railway Office of Arbitration which reads:

> **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.

The position which the Company advances is that the letter of July 29, 1996 does not meet the requirements of article 84 of the collective agreement, which governs the filing of grievances. The Company also argues, in part, that the provisions of agreements which result from material change notices are not, of themselves, provisions which form part of the terms of a collective agreement, and on that basis are not grievable. It further submits that the allegation of a violation of the **Canadian Human Rights Act** made by the Council is itself an issue not properly before a board of arbitration, but one which should be dealt with in another forum, under the administrative provisions of the **Act**.

The Arbitrator is compelled to sustain the position of the Company on the issue of arbitrability. It is clear from the terms of the collective agreement, and in particular article 84, that the parties intended the grievance procedure to be one which allows for reasonably clear identification of individuals affected by an alleged violation of the collective agreement, as well as some specificity with respect to the particular provisions of the agreement which may have been violated. While there may be scope for the filing of a policy grievance of more general application, it appears clear that article 84 nevertheless contemplates the progressive examination of any grievance through various steps of the grievance procedure, as a requirement of its advancement to the Canadian Railway Office of Arbitration for adjudication. The sending of a mere letter of inquiry, or a request that the Company review its position, which in the Arbitrator's view is a fair characterization of the letter of July 29, 1995, is plainly not of itself sufficient to alert the opposite party to the fact that a grievance is being filed, and that certain legal and procedural consequences may flow therefrom. This issue was touched upon in the following by the arbitrator in **CROA 827**:

> However that may be, a grievance, to be arbitrable, must have been filed in accordance with the provisions of the Collective Agreement, and must be dealt with in the proper course of the grievance procedure before proceeding to arbitration. In the instant case, although the correspondence filed shows that the Company sought clarification of the Union's complaints, and particulars thereof, there appears to have been no grievance filed in accordance with the terms of

> the Collective Agreement in that regard. While the matter was raised with the higher officials of the Company, the Company at no time waived compliance with the grievance procedure, but rather was careful to point out that what had been raised were "complaints" and to seek clarification thereof.

(*See also* **CROA 36, 102, 828, 827, 1900, 2072** *and* **2663**.)

If the orderly progressing of grievances under the system administered by the Canadian Railway Office of Arbitration stands for anything, it is that no party should find itself in receipt of a request for a joint statement of issue to progress a matter before the arbitrator without having previously been clearly served with a grievance that is reasonably specific as to the matter in dispute, with some indication of the provisions of the collective agreement which may be in question. Even where a Union may, as might be justified in some cases, rely entirely on an implied condition of a collective agreement, it is not unreasonable to expect it to state its position, make it clear to the employer that it is filing a grievance, and that it wishes to progress the matter through the grievance and arbitration procedure, as provided within the collective agreement and the CROA memorandum of agreement. None of these conditions was satisfied in the instant case. On that basis alone, therefore, the Arbitrator must sustain the position of the Company that the matter is not arbitrable.

It should be stressed, however, the above finding does not necessarily sustain the position of the Company to the effect that the provisions of agreements negotiated or arbitrated pursuant to a material change notice are not, of themselves, terms and conditions of employment which form a part of the collective agreement, and are therefore not grievable or subject to arbitration. It is difficult for the Arbitrator to appreciate how an employee who, for example, is entitled to payment of maintenance of earnings under a material change agreement could not progress a claim in respect of the failure of such a payment merely because the wages are calculable under a document ancillary to the collective agreement. Such claim would, I think, be arbitrable. Indeed such matters have been dealt with previously in this Office, without jurisdictional objection by either party. (*See, e.g.,* **CROA 2805**, **2866**, *and* **2886**.)

If the Arbitrator is incorrect on the issue of arbitrability, the dispute would nevertheless fail on its merits. If it were necessary to decide, I would feel compelled to reject the position of the Council to the effect that the Company's policy of denying access to early retirement opportunities to employees who are not actively at work is either a violation of the collective agreement or contrary to the **Canadian Human Rights Act**. In the Arbitrator's view the Council's position fails to appreciate the purposive underpinning of such early retirement incentives. They are provided as part of a series of benefits or advantages made available specifically to minimize the adverse impact of a material change on employees who are actively at work. More particularly, offering early retirement incentives to senior active employees tends to free up complement positions and avoid the layoff of more junior active employees. Very simply, offering early retirement incentives to employees who are not in active service, and who may be on extended medical leaves of absence, does nothing to enhance the work opportunities of persons who are actively at work and who are threatened with unemployment. Nor does it protect the employee on long-term leave against any adverse impacts, since he or she suffers none by reason of the material change.

The foregoing understanding of early retirement incentives is reflected in the genesis of material change provisions found in the railway industry. The first material change protections within the industry were provided for within the report of Mr. Justice Samuel Freedman, issued in 1965, in relation to the run-throughs of Nakina and Wainwright. The collective agreement language which issued from that award, and stood for over thirty years, provided, in part, as follows:

> **79.3** An employee whose position is abolished by a change made under the provisions of paragraph 79.1 or who is displaced by a senior employee, such displacement being brought about directly by and at the time of implementation of such change will, if he is eligible to receive an early retirement pension with an actuarial cutback, be entitled to receive:

The article went on to provide for allowances and lump sum payments as incentives for early retirement. As is clear from the foregoing, the protection of early retirement opportunities was, from the outset, meant to be available to an employee actively at work, whose position is abolished or who is displaced.

It appears that the provisions emanating from the report of Mr. Justice Freedman remained unchanged from the mid-1960s until May 5, 1995. During virtually all of that time, with the apparent exception of one laid off employee in a particular circumstance which arose in Prince Edward Island, early retirement incentives have never been

offered to inactive employees. Further, it appears that the established rationale has continued to operate under the memorandum of agreement of May 5, 1995. Article 79.10 negotiated under that memorandum provides, in part, as follows:

> **79.10** Case(s) of staff reductions which lend themselves to offers of optional early retirement separation allowances to employees eligible, under the Company pension rules **so as to avoid the otherwise unavoidable relocation and permanent separation of employees** with two or more years' service … (emphasis added)

As can be seen from the above, it is only where the offering of retirement incentives will free up positions so as to avoid the relocation or separation of employees that the offers are to be made. For the foregoing reasons the Arbitrator is satisfied that the terms of the collective agreement plainly contemplate the interpretation of the offer of early retirement separation allowances and incentives in the terms argued by the Company, namely that such incentives are not to be made available to employees other than those who are actively at work, whose retirement or attrition will directly benefit the process of mitigating adverse impacts of a material change.

Nor can the Arbitrator find any substance in the suggestion that the administration of these provisions is in some way contrary to the provisions of the **Canadian Human Rights Act**. It is generally recognized that the **Canadian Human Rights Act**, and similar provincial statutes, are intended to protect the status of employees who may suffer physical disabilities or illness, against discriminatory treatment. On that basis, employer actions which may undermine the seniority or eventual job security rights of disabled employees have been found to be discriminatory, and contrary to the **Canadian Human Rights Act**. In contrast, boards of arbitration have been careful to distinguish the issues of earned wages and benefits, recognizing that the denial of normal wages and benefits for time worked, to employees who are not at work, is not of itself discriminatory, or contrary to the **Act**. In the circumstance at hand, the Arbitrator cannot see how employees who are on long term disability leaves of absence can complain, on the basis of discrimination, that they have been denied early retirement incentives any more than they could legitimately claim the discriminatory denial of overtime opportunities. (*See* **Re Versa Services Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Union** *(1994), 39 L.A.C. (4th) 196 (R.M. Brown).*)

In the result, the Arbitrator is satisfied that the grievance is not arbitrable. In the alternative the Council's position discloses no violation of the terms of the collective agreement, nor of any provision for early retirement incentives established under the terms of an agreement negotiated or arbitrated pursuant to a material change. Finally, even if the matter were arbitrable, no violation of the **Canadian Human Rights Act**, or discrimination against employees on disability leaves of absence, is established.

For the foregoing reasons the grievance must be dismissed.

March 13, 1998

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