CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2943

Heard in Montreal, Wednesday, 15 April 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

Relocation benefits for P. Swim, R. McCallum and J. Clements.

EX PARTE STATEMENT OF ISSUE:

On August 2, 1995 the Company and the Union signed an agreement to implement measures to mitigate adverse effects for employees in Atlantic Canada (east of Joffre). The agreement was required by the provisions of Appendix 14 of the memorandum of agreement dated May 5, 1995 and signed in Toronto, Ontario pursuant to the negotiations under the auspices of Bill C-77.

The August 2, 1995 agreement provided for "relocation benefits" for employees affected by the implementation of the conditions of the May 5, 1995 agreement.

The grievors, all Moncton based employees, did not have sufficient seniority to work in Moncton due to the implementation of the May 5, 1995 agreement. The grievors have claimed the relocation benefits contained in the August 2, 1995 memorandum of agreement in accordance with paragraph "B" of Company Human Resources Officer George Gysel's letter to the General Chairperson dated August 2, 1995. Paragraph "B" states as follows:

> In respect to "relocation benefits", the $18,000 or $7,500 lump sum, as the case may be, will apply to those who opt to commute rather than relocate their residences on the Atlantic Region.

Other employees in Edmunston have been similarly affected, though who have not relocated their residences, have claimed and been provided the relocation benefits contained in the August 2, 1995 memorandum of agreement pursuant to Mr. Gysel's letter of August 2, 1995.

The Company has declined all claims stating that the grievors did not permanently relocate their residences.

FOR THE COUNCIL:

(SGD.) N. MATHEWSON
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

W. D. Agnew	– Manager, Labour Relations (ret'd), Moncton
A. E. Heft	– Manager, Labour Relations, Toronto
G. Search	– Labour Relations Officer, Toronto

And on behalf of the Council:

M. A. Church	– Counsel, Toronto

R. LeBel – General Chairperson, Quebec
G. Binsfeld – Vice-General Chairperson, Fort Erie
C. Fowler – Local Chairperson, Moncton

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the positions which the grievors held at the Company's Moncton terminal were eliminated by reason of substantial material changes in operations negotiated between the Company and the Council contained in an agreement dated May 5, 1995. That agreement saw substantial changes in methods of operation in respect of running trades employees within Atlantic Canada, including the abolishing of furlough boards, the introduction of two-person crews east of Joffre, the elimination of yard/road distinctions and the closure of a number of terminals. Appendix 14 of the memorandum of agreement of May 5, 1995 provided for the further negotiation of terms and conditions to minimize the adverse effects upon employees impacted by the changes. In the result, a further memorandum of agreement of August 2, 1995 was executed. It includes the following provision in relation to relocation expenses:

> **VI. RELOCATION EXPENSES**
> Employees required to relocate to maintain employment with the Company, will be entitled to the relocation benefits provided in articles 78 and 79 of agreements 1.1 and 4.16 respectively.
>
> In lieu of claiming relocation benefits as provided by the collective agreements, employees may opt for a lump sum payment of $18,000 for home owners and $7,500 for renters for relocations within the Atlantic Region, and $25,000 for home owners and $10,000 for renters who opt to relocate for work opportunities beyond the Atlantic Region.

In a letter sent to the Council, also dated August 2, 1995, the Company's Human Resources officer, Mr. George Gysel, communicated to the two general chairmen of the Council, clarifying certain terms of the agreement and asking for their signature on it. Part of the clarification reflected in the letter reads as follows:

> **b)** in respect to "relocation expenses", the $18,000 or $7,500 lump sum, as the case may be, will apply to those who opt to commute rather [than] relocate their residences on the Atlantic Region.

It is not disputed that the original intention of the Company was to bring the material changes into effect on September 1, 1995. In fact, however, delay was incurred in fully implementing the changes. Initially their completion was postponed to the change of timetable, scheduled for October 29, 1995. Thereafter, the final implementation was further pushed off to November 19, 1995 and, in fact, it appears that adjustments and benefits were being offered to some employees as late as December 31, 1995.

However important parts of the agreement, including job abolishments, went into effect as of September 1, 1995. It is not disputed that the grievors were compelled, under the combined terms of the memorandum of agreement and of the collective agreement to make their election within a seventy-two hour period in early September. It was clear that they could not hold work at their then home terminal of Moncton. As a result, all three bid to work, on the basis of their seniority, at the Company's terminal in Edmunston. The record discloses that Mr. McCallum worked initially for a period of some fifty-five days in Edmunston, from September 9 through November 3, 1995. He was then recalled to Moncton, and again laid off on January 4, 1996, causing him to exercise his seniority to Campbellton, N.B., being again recalled to Moncton on February 2, 1996. It would appear that he had further periods of layoff from Moncton, being compelled to work at Campbellton in the period of April/May of 1996 and, more recently at Edmunston.

Mr. Swim was laid off at Moncton on September 8, 1995 and exercised his seniority to Edmunston on September 11, 1995. He was recalled to Moncton on October 14, 1995 and shortly thereafter, on October 30, 1995, decided to transfer into the service of VIA Rail.

Mr. Clements was laid off at Moncton on September 6, 1995 and exercised his seniority, following his vacation, to Edmunston on October 6, 1995, where he continued to work until he decided to transfer to VIA Rail on October 29, 1995.

As the evidence indicates, following their layoff at Moncton grievors McCallum, Swim and Clements were compelled to exercise their seniority to Edmunston in order to hold work, which they each did for initial periods of fifty-five, thirty-two and fifty-two days respectively. The only other option available to them at the time of their layoff at Moncton was to accept layoff for an indefinite period.

The fundamental position argued by the Company is that the grievors were not "required to relocate to maintain employment with the Company," within the meaning of article VI of the memorandum of agreement of August 2, 1995. Its representative maintains that when the grievors exercised their seniority to Edmunston the implementation of the material changes resulting from the memorandum of agreement of May 5, 1995 was not yet complete. Specifically, he stresses that the parties did not then know which employees, and how many, would opt to take retirement incentives, thereby increasing opportunities for continued employment at Moncton for junior employees. In fact, the Company submits, when those eligible for early retirement and bridging opportunities ultimately made their elections, initially as of November 19, 1995, sufficient positions were opened at Moncton to accommodate the grievors. On that basis the Company submits that Mr. Swim, Mr. McCallum and Mr. Clements were not in fact compelled to commute to work in Edmunston to maintain employment with the Company, a fact which it submits would be reasonably apparent to them at the time of their original layoff at Moncton. By the Company's characterization, what occurred in early September should be viewed as a temporary forced transfer of the employees to Edmunston pending eventual clarification of the employment situation at Moncton, depending on the taking up of retirement and severance incentives by more senior employees, whose eligibility was generally known at the time the grievors made their election.

Counsel for the Council disputes the characterization of events put forward by the Company. He submits that there were, very simply, no assurances to the grievors, or to any other employees, as to what employment opportunities might ultimately remain in Moncton. Counsel stresses that the grievors saw themselves laid off at Moncton and then had two options: either to exercise their seniority to another location to maintain employment with the Company, or to accept layoff at Moncton. He submits that they exercised the first option, as they had the right to do, in circumstances where the extent of their obligation to commute to Edmunston was at best indefinite. He stresses that there could be no certainty as to how many of the employees eligible for early retirement incentives at Moncton would in fact elect to take them.

More fundamentally, Counsel for the Council submits that the language of the memorandum of agreement of August 2, 1995, read together with the letter from Mr. Gysel of the same date, leaves no doubt as to the entitlement of the grievors to the lump sum amounts described above. He submits that the lump sum, as applied to the grievors, was a negotiated figure in consideration of the uncertainty and disruption which they would be compelled to experience as a result of the elimination of their positions at Moncton. He argues that there are no qualifications within the language of the memorandum of agreement, and that the grievors were in fact compelled to make their choice in early September, failing which they could have eventually lost their job security protections and, ultimately, their employment.

The Arbitrator can appreciate the perspective which motivates the employer's position. As a general rule material change agreements are implemented on a fixed date, when employees are generally in a position to know the election of other employees, and can reckon with some certainty on the best outcomes available to them by the exercise of their seniority. Exceptionally, in the case at hand, the parties agreed to a staged implementation of the agreement of May 5, 1995, as a result of which the ultimate shake-out of the process would not be known until quite late in the year. It is understandable that the Company would naturally wish to protect against the possibility of an employee electing to protect work at another location, knowing, for example, that his or her obligation would last only for a matter of a few days, for the sole purpose of making claim to a lump sum payment of several thousand dollars, only to be relocated to his or her original position, with no permanent burden of relocation. However, the position argued by the Company speaks more to the kind of contract language which the Company should prudently have considered negotiating in the admittedly unusual circumstances of the substantial material changes brought to bear in Atlantic Canada as a result of the memorandum of agreement of May 5, 1995. The fact is that as of September 1, 1995 the Company began to realize important savings and employees in the position of the grievors were then faced with a radically changed world. They no longer had the protection of a furlough board, and faced layoff at Moncton. It is difficult, in that circumstance, for the Arbitrator to disagree with the assertion of Counsel for the Council that they then had two options, namely to accept layoff or, if they wished to maintain employment with the Company, to exercise their seniority to another location in Atlantic Canada. They did so, and on that basis claim entitlement to the lump sum payment available under article VI of the agreement of August 2, 1995.

It is significant, I think, that there was no indication made to the grievors, as far as the record before the Arbitrator discloses, that by the exercise of seniority they would be moving only temporarily to Edmunston. While the Company's representative indicates that there were meetings held with employees at the time of implementation, there is no documented record that employees were told that they could not claim the lump sum payments for relocation until such time as the final count of employees availing themselves of early retirement, bridging or other severance opportunities at Moncton was fully known. At best, at the time the grievors were compelled to make their election, they were required to protect work at another location, on the basis of their seniority, for an indefinite period. There is no qualifying language to be found in any part of the memorandum of agreement of August 2, 1995, nor in the letter of Mr. Gysel of the same date, which would have postponed the entitlement of the grievors to payment of the relocation allowance in the circumstances described. Indeed, the record before the Arbitrator indicates that at least some employees in a relatively similar situation applied for and received the lump sum payment within a period of a few weeks of their own election to commute to another location, well in advance in the final determination of senior employees opting to sever their active employment at Moncton.

In the instant case I must take the terms of the memorandum of agreement of August 2, 1995, and the accompanying letter of Mr. Gysel, as I find them. There is no ambiguity in the language of these provisions, which clearly provide to an employee who is required to relocate to maintain employment the benefit of the lump sums described within article VI of the memorandum. As the letter makes clear, those sums are available to employees who opt to commute rather than move their residences, as did the grievors. I can see no basis upon which the claim of the grievors can be denied in the face of such clear contractual language. This is not a case of a technical or temporary move of only a few days. It was, of course, open to the parties to include qualifying provisions delaying the entitlement to the lump sum payments to persons in the position of the grievors, pending the final determination of the number of jobs which would be available at their original home terminal. In fact, however, the Company pressed for the commencement of implementation of its agreement as of September 1, 1995, forcing the grievors to make their election and to relocate to protect their employment. By so doing it brought them within the entitlement provided for in the language of the memorandum. There is, very simply, no qualifying language which would reflect the different intention the Company now wishes to read into the document.

For the foregoing reasons the Arbitrator is satisfied that all three grievors were required to relocate to maintain employment with the Company within the meaning of article VI of the memorandum of agreement of August 2, 1995. They are therefore entitled to the payment of the lump sums described within the article, and in the letter of Mr. Gysel dated August 2, 1995.

The grievances are therefore allowed. The Arbitrator directs that the Company compensate the grievors forthwith, by payment of the lump sums to which they are entitled, with interest, as requested by the Council.

April 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR