CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3039

Heard in Montreal, Wednesday, 10 March 1999

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:

The applicability of a general wage increase as per Article 78.13 (Maintenance of Earnings) of Agreement 1.1.

JOINT STATEMENT OF ISSUE:

On May 5, 1995, the Company and the Council entered into an agreement to address "adverse effects in changes in working conditions". Part of this agreement revised article 78.13 of agreement 1.1., covering employees adversely affected through maintenance of earnings.

Mr. Laidley, P.I.N. 859222, submitted a claim for a 2% increase in is maintenance of earnings as a general wage increase of 2% became effective 1 January 1996.

The Union and the Company agreed to handle this case as a policy grievance and time limits have been mutually extended between the parties.

It is the Brotherhood's contention that the cap referred to in Note 2 of article 78.13(a) applies only to the initial calculation of the basic weekly earnings. Therefore, the general wage increase of 1996 and subsequent years would apply.

The Company has declined payment on the basis that article 78.13, more expressly Note 2, applies in this instance in which the amount of basic weekly pay for an employee in road service will in no case exceed $1,600.00

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) R. DYON	(SGD.) A. E. HEFT
GENERAL CHAIRMAN	FOR: SR. VICE-PRESIDENT LINE OPERATIONS

There appeared on behalf of the Company:

F. O'Neill	– Labour Relations Associate, Great Lakes District, Toronto
G. Search	– Manager – Network Rationalization, Toronto
P. Parker	– Assistant Manager, Pay Systems and Incumbencies, Edmonton
D. W. Coughlin	– Witness

And on behalf of the Council:

R. Dyon	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

The sole issue in dispute is the interpretation and application of note 2 of article 78.13(a) of the collective agreement. Article 78.13(a) reads as follows:

> **78.13 (a)** In the application of this article, the term "basic weekly pay" is defined as follows:
>
> **1.** For an employee assigned to a regular position in yard service or hostling service at the time of displacement or lay-off, 5 days' or 40 hours' straight time pay, including the shift differential when applicable, shall constitute his or her "basic weekly pay".
>
> **2.** For an employee in road service, including employees on spareboards, the "basic weekly pay" shall be one fifty-second (1/52) of the total earnings of such employee during the twenty-six full pay periods preceding his or her displacement or lay-off.
>
> **NOTE 1:** When computing "basic weekly pay" pursuant to sub-paragraph (2) above, any pay period during which an employee is absent for seven consecutive days or more because of a bona fide injury, sickness in respect of which an employee is in receipt of weekly indemnity benefits, authorized leave of absence or laid off together with the earnings of an employee in that pay period, shall be subtracted from the twenty-six (26) pay periods and total earnings. In such circumstances "basic weekly pay" shall be calculated on a pro-rated basis by dividing the remaining earnings by the remaining number of pay periods.
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> **NOTE 2:** Notwithstanding the provisions of sub-paragraph 78.13(a), the amount of basic weekly pay for an employee in road service will in no case exceed $1,600.

The instant dispute, brought forward as a policy grievance, is based upon the circumstances of employee J.H. Laidley. It is common ground that he was affected by the implementation of belt-pack operations in May of 1995. After some initial adjustments, it was agreed that he was entitled to maintenance of earnings as of December 30, 1995 with his basic weekly pay set at the maximum of $1,600.00 weekly. The grievance arises as a result of the fact that following the implementation of a 2% general wage increase in January of 1996, no upward adjustment was made in the grievor's basic weekly pay for the purposes of his ongoing maintenance of earnings payments. The Council maintains that the grievor was entitled to an upward adjustment to reflect the 2% general wage increase, which would have entitled Mr. Laidley to the higher maintenance of earnings rate of $1,632.00 weekly.

The Company's position is that the parties amended the language and intent of article 78.13 in their negotiation of the memorandum of agreement of May 5, 1995. According to its submission, the change in language then implemented reflects the intention that employees are not to be given upward adjustments in their basic weekly rate in the calculation of their maintenance of earnings protection by reason of general wage adjustments. In other words, the Company submits that the parties intended that $1,600.00 be the maximum entitlement of an employee in respect of his or her basic weekly rate calculation for all purposes in the administration of maintenance of earnings payments, regardless of any general wage adjustments.

The Council counters that the cap of $1,600.00 per week reflected in the language of article 78.13(a) was not so intended, but is intended only for the sole purpose of establishing an employee's initial basic weekly pay, no matter that his or her actual earnings might have been higher, at the initial step of administering the maintenance of earnings provisions of the agreement. In the Council's submission once that initial basic weekly pay is established within the cap of $1,600.00, it can thereafter be adjusted upward to reflect general wage increases.

It is clear to the Arbitrator that the language of the provisions governing the calculation of an employee's maintenance of earnings in the agreement in effect prior to May 5, 1995 would undoubtedly have sustained the position of the Council. It is common ground that the collective agreement in force in 1992 and 1993, referred to as the agreement of January 21, 1993, contained the following language as Note 2:

> **NOTE 2:** Notwithstanding the provisions of sub-paragraph 78.13(a), the amount of the basic weekly pay for an employee in road service will in no case exceed $1,208.44.

> The amount specified in this NOTE (2) is obtained by dividing an annual maximum of $62,839 by 52 weeks. **The annual maximum of $62,839 shall be increased by the amount of any future general wage adjustments.**
>
> (emphasis added)

As can be seen from the foregoing, it was clearly the agreed intention of the parties, prior to May 5, 1995, and indeed in keeping with general practice, that an employee's basic weekly pay was to be made subject to a maximum amount in its initial calculation, at a cap of $1,207.44. Additionally, the parties were explicit in acknowledging that the cap was provided only for the purpose of establishing the initial basic weekly pay, and that any subsequent general wage adjustments must be applied to the cap or annual maximum so provided.

The issue therefore becomes whether the change in the language of Note 2 implemented in the agreement of May 5, 1995 represents an agreement to change the previous practice, and to extend the cap for all purposes in the administration of maintenance of earnings. In other words, did the parties mutually intend that the previous practice of applying general wage adjustments to an employee's maximum amount of basic weekly pay should be discontinued? And if they were not of one mind, must the agreement be so construed?

A review of the submissions of the parties leaves the Arbitrator in substantial doubt as to the position of the Company in this matter. While its representatives argue that the upwards adjustment in the maximum or capped amount, to the sum of $1,600.00, should be viewed as a trade-off for the agreement that general wage adjustments should not apply, there is no evidence of bargaining history to indicate that any such understanding was reached between the parties. At the arbitration hearing the Company's own representatives at the bargaining table acknowledged that while the amended language of Note 2 was tabled by the Company, there was no specific explanation made which would have put the Council on notice that the Company considered that the language so formulated would put an end to the previous practice of allowing adjustments in the maximum amounts by the application of subsequent general wage adjustments. Whatever the Company may have hoped to achieve by the change in language, it is clear that it never conveyed to the Council that the language was intended to implement a radical departure from the previous operation of the maintenance of earnings protections afforded to employees. Affidavits placed before the Arbitrator, signed by two representatives of the Council involved in the negotiations, confirm that they never had any such understanding, and that as the Company acknowledges, there was no discussion that such a dramatic change in substance would result.

When the general scheme of article 78 of the collective agreement is construed, it appears to the Arbitrator that a strict interpretation approach to the language would sustain the position of the Council. Maintenance of earnings is governed by article 78.13, which deals with a number of elements. First among them is establishing an employee's "basic weekly pay", an exercise entirely described within sub-paragraph (a) of the article. Sub-paragraph (b) describes the mechanism by which basic weekly pay is applied to employees who have maintenance of earnings protection, through the payment of their incumbency in certain described conditions. Significantly, sub-paragraph (d) goes on to address the issue of the impact of general wage adjustments as they might affect an employee's basic weekly pay and the calculation of his or her incumbency. It provides as follows:

> **78.13(d)** In the calculation of an employee's incumbency, the basic weekly pay, exclusive of any shift differential included in respect of employees assigned to a regular position in yard service, shall be increased by the amounts of any general wage adjustments applicable during the three-year period immediately following his or her job abolishment or displacement and the amount of any shift differential previously paid and deducted will again be added. Following this three-year period, the basic weekly pay last established will continue to apply.

As can be seen from the foregoing, the parties' own contractual language distinguishes between the calculation of an employee's incumbency and his or her basic weekly pay. The language expressly contemplates that basic weekly pay is to be increased "… by the amounts of any general wage adjustments applicable during the three-year period immediately following his or her job abolishment or displacement …".

On the face of the language, the article appears to limit Note 2 of sub-paragraph (a) to the initial exercise of calculating an employee's basic weekly pay. By the language there provided, even though an employee's basic weekly pay might exceed $1,600.00 per week based on his or her prior service, no employee can claim such a rate for the purposes of initially establishing his or her basic weekly pay. There is nothing, however, in the language of article 78.13 generally to suggest that the maximum basic weekly pay so determined is not subject to adjustment

under the provisions of sub-paragraph (d), the provision which deals specifically with the impact of general wage adjustments.

Further, when the issue is assessed from a purposive point of view, the position of the Company remains doubtful. As can be seen from the provisions of article 78.13, a part of the fundamental rationale for maintenance of earnings is to minimize the adverse effects of a material change in operations upon employees by providing to them, for a limited period of time, continued wage protection at the rate of their established basic weekly pay. That protection is not indefinite, however, and becomes overtaken by a form of red circling triggered at the expiry of three years. As is evident from sub-paragraph (d), an employee does not have the benefit of general wage adjustments applied to his or her basic weekly pay beyond a limit of three years.

If the Company's position is sustained, for some red circling would in fact be applied from the very outset of the maintenance of earnings exercise, with the establishing of the basic weekly pay of employees at the maximum amount of $1,600.00 per week for employees in road service. Employees would in fact be red circled or frozen at that rate, and be denied the benefit of general wage adjustments implemented thereafter. That, it is not disputed, would mean that the ability of an employee to maintain his or her relative wage position would be commensurately eroded, in a manner radically different from the previous application of article 78.13. It is, of course, open to the parties to so substantially change their understanding of maintenance of earnings protections, a concept which has considerable history of application within the industry. In my view, however, a contractual agreement to give effect to such a substantial intention must be supported by clear and unequivocal language. Such language is not evident in the material before me. I am compelled to conclude that the adjustment in the language of Note 2 is, as the Council contends, best construed as a streamlining provision, which simply eliminated the arguably superfluous provision of the first sentence of the second paragraph of the Note, which describes a self-evident exercise in mathematical division. Likewise, the second sentence of the second paragraph can be seen as redundant, given the parallel application of paragraph (d) of article 78.13. Nowhere in the written document, and nowhere in the discussion between the parties at the bargaining table, is there any evidence of a mutual intention to deny any employees the benefit of general wage adjustments in the ongoing calculation of their basic weekly pay. On that basis, the grievance must succeed.

The Arbitrator finds and declares that the interpretation of the Council with respect to the claim of Mr. Laidley is correct, and that he is entitled to the application of general wage adjustments to increase his basic weekly pay beyond the maximum of $1,600.00 per week for the purposes of the calculation of his incumbency. He is therefore to be compensated accordingly. Should the parties be disagreed as to the any further remedy which might attach to the broader policy grievance, the matter may be spoken to .

March 15, 1999

(signed) MICHEL G. PICHER
ARBITRATOR