CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3103

Heard in Montreal, Wednesday, 11 April 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. J.F. Gonyu.

EX PARTE STATEMENT OF ISSUE:

On or about January 27, 1999, the grievor was affected by reduction in staff and as a result of technological, operational or organizational changes implemented pursuant to article 8.1 of the Job Security Agreement ("JSA"), was unable to hold work affecting him. Notwithstanding this, the grievor was denied ES entitlement on the basis that he had never held a permanent position with the Company. The Brotherhood grieved.

The Union contends that the Company's actions are in violation of article 7.1 and 7.2 of the JSA.

The Union requests that the grievor be compensated for all lost earnings and expenses incurred as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

E. J. MacIsaac	– Labour Relations Officer, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
D. W. Brown	– General Counsel, Ottawa

AWARD OF THE ARBITRATOR

It is common ground that two article 8 changes, implementing technological, operational and organizational (TO&O) changes, took place in recent years on the territory where the grievor was employed. The first involved the sale of operations on the Ottawa Valley line in 1996, resulting in some fifty-one job abolishments effective October 28, 1996. The second article 8 notice issued on June 23, 1997, to be effective December 16, 1997, resulting in the abolishment of nineteen positions on the grievor's basic seniority territory. Neither of the TO&O changes did, however, directly result in any adverse effect upon Mr. Gonyu at the time of the effective dates of their application. At the material times he held temporary positions which were not abolished, and continued to work.

Subsequently, on January 27, 1999 Mr. Gonyu's position was abolished by reason of seasonal adjustments in the Company's work crews. The parties do not appear to be in dispute that the grievor's layoff was the result of a normal business adjustment which would not, on its own, qualify as a technological, operational or organizational change within the meaning of the Job Security Agreement (JSA). The Brotherhood submits, however, that the grievor's layoff in January of 1999 becomes the effective date of the earlier technological, operational or organizational changes for the purposes of what it claims is his entitlement to employment security (ES) benefits. Very simply, it is the Brotherhood's position that because positions into which Mr. Gonyu could otherwise have displaced in January of 1999 were no longer available to him by reason of the earlier TO&O abolishments, he was then adversely impacted by those TO&O changes, and was therefore entitled to claim the benefit of ES protection under the Job Security Agreement. The Brotherhood submits that the grievor suffered a "continuing layoff" resulting from the earlier TO&O changes, as contemplated under article 7.2(a) of the Job Security Agreement which provides, in part:

> **7.2 (a)** An employee who has ES under the provisions of this article who is subjected to layoff or continuing layoff as the result of a change introduced through the application of article 8.1 of the Job Security Agreement shall be eligible for ES payments from the Employment Security Fund …

The Company asserts a number of positions in response. Firstly, it maintains that the grievor cannot, in any event, claim the benefit of employment security under the Job Security Agreement as he did not hold a permanent position. In that regard it relies upon **CROA 2720**. Secondly, its representatives submit that the language and scheme of the Job Security Agreement do not extend employment security protections to employees who are not themselves immediately impacted at the time of the first implementation of a technological, operational or organizational change. In the Company's submission the concept of "continuing layoff" must imply that the employee in question is already laid off at the time the Company puts a TO&O change into effect, so that his or her prospects of continued employment by recall from layoff are in fact diminished, thereby giving rise to the ES protections contemplated. In the Company's view the provisions of the JSA were never intended to provide what it characterizes as retroactive protection to an employee not immediately impacted by a TO&O change at the time it is implemented, but only indirectly impacted at a later date, by reason a separate layoff unrelated to the original TO&O change.

The Arbitrator finds in unnecessary to deal with the first issue raised in this grievance, namely whether the grievor is disentitled to employment security protection by reason of the fact that he did not hold a permanent position. While the finding of this Office in **CROA 2720** was to the effect that an employee holding a temporary position is not entitled to ES, that determination was reversed by a decision of the Quebec Superior Court, and is presently pending appeal before the Quebec Court of Appeal. Even accepting, as the Brotherhood argues, that the most recent decision of the Quebec Superior Court is binding for the purposes of the grievor's entitlement to ES notwithstanding his status as a temporary employee, I am satisfied that the grievance cannot succeed on other grounds.

For the grievance to succeed the Brotherhood must establish that the grievor has lost work by reason of an "continuing layoff" within the meaning of article 7.2(a) of the Job Security Agreement. The fundamental issue, in other words, is whether Mr. Gonyu lost work, work opportunities or earnings by reason of the two TO&O changes implemented in 1996 and 1997 when he was seasonally laid off in January of 1999. There is, of course, no dispute that the job pool of work available to Mr. Gonyu at the time of his layoff in January of 1999 was reduced by reason of the earlier job abolishments resulting from the two TO&O changes which did not directly impact him at the time they were implemented. The issue becomes, therefore, whether the Job Security Agreement contemplates that an

employee in the grievor's situation can claim the "delayed impact" of the earlier TO&O changes as a basis for a claim for employment security on the implementation of a seasonal layoff.

In the Arbitrator's view the language of the Job Security Agreement and the prior jurisprudence make it clear that Mr. Gonyu's claim cannot succeed. The issue of indirect or remote impacts resulting from a technological, operational or organizational change has been addressed in a number of prior awards. In **SHP 289**, an award dated December 7, 1989 involving the Canadian National Railway Company and the International Association of Machinists and Aerospace Workers, the arbitrator made the following comments with respect to the general scheme of job security agreements in the railway industry:

> … Employment security is a right of obvious importance both to the employee who has the benefit of its protection and to the Company, which must know with as much certainty as possible what its ongoing liability will be. The employer may not know with precision which employees will ultimately receive employment security benefits, as it cannot know in advance the contingencies of early retirement, voluntary refusals to exercise seniority or relocate and elections of layoff by the employees affected. As a general matter, however, in making a business decision in respect of the implementation of a technological, operational or organizational change it is important for the Company to be able to assess the cost impact of such a change and, in doing so, make some reasonable estimate of the employees who are entitled to invoke employment security protection. If the interpretation of the Union should apply, however, the position of the Company would be substantially more uncertain. While it can look to its seniority lists to determine with precision the number of employees who will have achieved eight years of cumulative compensated service as at the effective date of an Article 8 notice, it can never know with the same certainty the number of employees who, if the Union's interpretation is accepted, may by virtue of temporary recalls eventually acquire employment security which, if the Union is correct, can then be applied retroactively to the earlier Article 8 notice. In the Arbitrator's view it is unlikely, absent clear language to the contrary, that the parties would have intended that the Company be placed in such a position. That conclusion casts substantial doubt on the merits of the Union's argument.

This Office had occasion to deal with the issue of the delayed impact of a TO&O change in **CROA 2592**. That award found that the concept of employees adversely affected by a TO&O change applied only "… to employees whose positions are abolished due to the article J notice or who are displaced by a senior employee." In other words, the fact that the size of the Company's operations has been reduced, a fact which may have permanent and ongoing impact on the work opportunities of remaining employees in years to follow, does not of itself become an adverse impact to be dealt with within the framework of the Job Security Agreement provisions. In **CROA 2592** this Office adopted the reasoning of earlier jurisprudence involving article J notices and special agreements resulting from job abolishments, whereby the special protections available to employees were seen as limited to those whose jobs were abolished, or who suffered the loss of their own position by reason of a resulting displacement. In that award the following comment appears:

> The principle that the protection of agreements such as the ESIMA and special agreements negotiated for the protection of employees adversely impacted by Company actions should not extend unduly to employees indirectly or remotely impacted was first articulated by Arbitrator Weatherill in **AD HOC 126** which involved the application of a special agreement under the Railway Passenger Services Adjustment Assistance Regulations between Canadian Pacific Limited and the United Transportation Union. In that award he commented, in part, as follows:
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> > . . . The cases of those whose positions were abolished and who were unable to hold other jobs are clear, as are the cases of those displaced by the exercise of seniority in such circumstances. It is, however, not clear that persons who did not hold regular positions should be said to be "adversely affected" within the meaning of the Special Agreement, where the effect on their work or earnings is only indirect. While, in a general way, such persons may appear to be "affected" by the change (as, in a general way, were many others), they do not, in my view, come within the class of those contemplated by the Special Agreement as entitled to benefits.

In the Arbitrator's view it is also clear that the instant case does not involve a "continuing layoff" as intended by the language of article 7.2(a) of the Job Security Agreement. In **SHP–285** at pp 5-6 the arbitrator commented:

> ... The words “continuing layoff” appearing in article 7.2 of the Plan must be taken to mean a layoff which is ongoing as at the effective date of the Article 8 notice. In that circumstance, for example, an employee with employment security who was already laid off for reasons other than technological, operational or organizational change retains the right to assert his or her employment security, subject always to the procedural requirements of the Plan.

It would appear well settled that a continuing layoff is one which must be in effect when a TO&O change is first implemented. A separate layoff which occurs months or years after a TO&O change does not qualify as a continuing layoff, nor can it fairly be characterized as becoming the effective date of the earlier article 8 notice.

For the foregoing reasons the Arbitrator is satisfied that the grievance cannot succeed. While it may be that the grievor was compelled, for practical purposes, to hold temporary employment to protect his own seniority in higher rated classifications at the time of the two TO&O changes, and therefore did not hold a permanent position which was abolished, that reality is part of the trade off of rights and obligations which the parties have fashioned for reasons which they best appreciate. In the final analysis the facts before the Arbitrator resolve themselves to this. Mr. Gonyu was not adversely impacted by either the sale of the Ottawa Valley lines or by the subsequent job abolishments of 1997, either directly or indirectly at the time they were implemented. In the Arbitrator’s view this is not a circumstance of a “continuing layoff”, as that concept could only apply to an employee who was in fact laid off at the time a TO&O change was originally implemented. Mr. Gonyu’s circumstance involves a later and separate layoff which, it is not disputed, was triggered by a regular and normal reduction of work crews implemented seasonally. Even accepting, subject to the pending appeal before the courts, that as an employee holding a temporary position Mr. Gonyu can claim the protections of employment security, he plainly cannot do so where his layoff is not the direct consequence of a technological, operational or organizational change. That he may, many months or years after the implementation of a technological, operational or organizational change, find himself with fewer opportunities for recall or displacement does not bring him within the concept of immediate adverse effects and the related protections of the Job Security Agreement. Those are intended to apply to persons directly impacted at the time a technological, operational or organizational change is implemented. If it were otherwise, and the Brotherhood’s interpretation correct, given the scope of the job abolishments within the industry in recent years, virtually all layoffs, and their reduced prospects of recall, could be said to be TO&O related. So sweeping a conclusion would, in my view, require clear and unambiguous collective agreement language to support it. No such language appears in the collective agreement or the Job Security Agreement.

For all of the foregoing reasons the grievance must be dismissed.

April 14, 2000

(signed) MICHEL G. PICHER
ARBITRATOR