CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3329

Heard in Montreal, Wednesday, 9 April 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Declination of wage increases for the years 1997, 1998 and 1999, as related to his basic weekly salary under the terms and conditions of Option "B", Item 2, of the Belt Pack Memorandum of Agreement, dated October 03, 1995, favour Locomotive Engineer R.L. Pero of Terrace, B.C.

BROTHERHOOD'S STATEMENT OF ISSUE:

On or about February 7, 1996, Locomotive Engineer Pero was removed from the working board after completing his last trip as a result of being successful in an application for a "bridging package" under Option "B", as outlined in the memorandum of agreement, dated October 03, 1995, better known as the "Belt Pack" agreement.

The Brotherhood has taken a position that general wage increases should properly be applied to the grievor's basic weekly salary for the years 1997, 1998 and 1999.

The Company has declined the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) D. E. BRUMMUND
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. Reny	– Sr. Manager, Human Resources, Vancouver
M. Becker	– Director, Labour Relations
J. Torchia	– Director, Labour Relations, Edmonton
D. Coughlin	– Witness
S. Blackmore	– Manager, Human Resources, Edmonton
D. VanCauwenbergh	– Manager, Human Resources, Winnipeg

And on behalf of the Brotherhood:

D. E. Brummund	– Sr. Vice-General Chairman, Edmonton
B. Willows	– Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

It is common ground that as a result of the institution of belt pack technology and resulting adjustments in the number of employees utilized in yard service the Company executed a memorandum of agreement on October 3, 1995, commonly referred to as the "Belt Pack Agreement". Among other things, the agreement provided for retirement, deferred separation and severance opportunities, as well as maintenance of earnings, training and relocation expenses.

On February 20, 1997 Locomotive Engineer Pero was awarded a credit under the provisions of Option B of the memorandum for deferred separation, also referred to as "bridging". He therefore became eligible to leave active employment while in receipt of 65% of his basic weekly pay until his eligibility for early retirement which matures in April of 2003. In the result, in the years 1997 through to the present Mr. Pero has been in receipt of 65% of his

basic weekly pay. The Brotherhood asserts that under the language of the memorandum of agreement the grievor is entitled to the annual increments in effect from 1997 to the present in the calculation of his basic weekly pay. The Company maintains that the basic weekly pay as calculated under the memorandum at the original point of Mr. Pero leaving his active employment remains unchanged, and is not to be altered by the addition of annual wage increments.

The Brotherhood's case rests essentially on language found within article II, Deferred Separation Plan, Item 2, Option "B", sub (b) which reads as follows:

> **(b)** Employees who elect deferred separation will be compensated on the basis of 65% of the Basic Weekly Pay of the permanent position held at the time the above-noted changes are implemented until such time as they are eligible for early retirement. Basic Weekly Pay will be determined in the same manner as provided for under Article 78.13 of Agreement 1.1.

It is common ground that article 78 of collective agreement 1.1 deals with material change. Article 78.13 contains the provisions governing maintenance of earnings for employees adversely affected by a material change. In support of its position in the instant grievance the Brotherhood relies on paragraph 78.13(d) of the collective agreement which reads as follows:

> **78.13 (d)** In the calculation of a locomotive engineer's incumbency, the basic weekly pay, exclusive of any shift differential included in respect of locomotive engineers 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.

The Brotherhood's representative maintains that the foregoing language, coupled with the reference to basic weekly pay being calculated in the same manner as provided under article 78.13, reflects the understanding of the parties that annual increments are to be folded into the basic weekly pay of an employee on deferred separation.

The Company takes a different position. It notes to the Arbitrator's attention the two following provisions of the 1995 memorandum of agreement providing that a person electing a deferred separation will: "be compensated on the basis of 65% of the Basic Weekly Pay of the permanent position held at the time the above-noted changes are implemented until such time as they are eligible for early retirement."

The Company stresses that the reference to article 78.13 of the collective agreement is solely for the purpose of adopting by reference a method of calculating an employee's basic weekly pay, something which is also done, of necessity, in establishing an incumbency for the purposes of maintenance of earnings. In that regard the Company's representative has reference to the following provision of article 78.13:

> **Maintenance of Earnings**
>
> **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.

> **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 $1,600.

According to the representations of the Company, which are not substantially disputed, for the many years that deferred separation packages have been offered to employees of this Company, and elsewhere in the railway industry, there has never been, subject to one exception, any provision whereby the basic weekly pay of a person in receipt of deferred separation benefits is increased on the basis of annual wage increments during the course of the bridging period. The sole exception to the general rule against the application of annual wage increments to an employee's basic weekly pay for the purposes of a bridging package is found in the 1990 Freight Crew Consist Agreement, the product of an arbitration award. The Company's representative stresses that there is no express language to be found in the belt pack agreement which would support the Brotherhood's position in the case at hand.

In further support of its argument the Company refers the Arbitrator to correspondence exchanged between the Company and the Brotherhood at the time the agreement was entered into. In a letter dated October 26, 1995 former Brotherhood General Chairman Brad Wood specifically asked the Company whether employees on deferred separation would receive future contract wage percentage increases. In response to that question, and a number of others, the Company answered in a letter dated November 8, 1995 which reads, in part:

> **Q1** Do employees on deferred separation [bridging] receive future contract wage percentage increases?
>
> **A1** No. As you will note, sub-paragraph (b) of both Items 1 and 2 (Option A & B) of article II reads as follows:
>
> … Basic Weekly Pay of the permanent position held at the time the above-noted changes are implemented. …

The Company's response, above quoted, was also copied to General Chairmen Wayne A. Wright and Cliff Hamilton. No objection was taken then or since by the Brotherhood to the very clear position then enunciated by the Company on November 8, 1995, until the filing of this grievance.

The Arbitrator can understand the Company's assertion that it is now at a loss to understand on what basis this grievance can be brought forward. The correspondence between the parties who were instrumental in negotiating the terms of the belt pack agreement deferred separation conditions leaves no doubt that they mutually intended and understood that, in keeping with long-standing practice in the industry, annual wage increments would not be applied to an individual's basic weekly pay for the purposes of bridging. While it is always open to the parties to a collective agreement to suggest a particular reading or interpretation of the language of their understanding where they have been silent as to its precise meaning, there can be little room for such interpretive creativity where the record clearly discloses, through long-standing practice and express correspondence, that the parties specifically addressed their mind to the question and reached an understanding. If it were otherwise, there could be no finality in the day to day administration of collective agreement provisions.

To give content to the Company's concerns in the case at hand, it is not without significance that one of the general chairmen who negotiated the agreement, Mr. Wright, himself had the benefit of electing the bridging option effective January 1, 1997 prior to his own eventual retirement on September 30, 1999. No claim was made on behalf of Mr. Wright, nor was any such claim made on behalf of General Chairman M. Simpson of Western Canada who commenced bridging effective April 9, 2001. The Company effectively submits that the instant grievance has the appearance of a "trying on" of a novel interpretation notwithstanding a clear understanding which the Brotherhood knew, or reasonably should have known, was well-established between the parties. I do not consider it necessary, however, to rule upon the Company's assertion that the grievance is frivolous.

The Arbitrator is satisfied that there was an understanding at the time of the belt pack agreement, consistent with virtually all other such agreements in the industry, to the effect that deferred separation payments based on the calculation of basic weekly pay are not to be increased by periodic wage increments. The Brotherhood points to no clear and specific language in the collective agreement or the memorandum of agreement of October 3, 1995 that would sustain any contrary conclusion.

For the foregoing reasons the grievance must be dismissed.

April 11, 2003

(signed) MICHEL G. PICHER
ARBITRATOR