CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3443

Heard in Edmonton, Thursday, 15 July 2004

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE – MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Policy dispute concerning the extent of the liability of the Company in the implementation of a permanent staff reduction under the terms of either an article 8.1 notice or article 15.1 notice.

JOINT STATEMENT OF ISSUE:

When a permanent staff reduction is implemented pursuant to article 15.1 of the collective agreement or article 8.1 of the JSA, the Company takes the position that the Company's liability is limited to the net reduction of positions listed on the staff reduction notice. More specifically, the Company takes the position that the sum of the number of employees attaining employment security (ES) status and the number of employees opting for a package pursuant to article 7.14 cannot exceed the number of positions abolished and the number of positions created. The Union disagreed with this position and therefore filed a grievance.

The Company makes an exception for positions abolished in one collective agreement supplement and created in another collective agreement supplement.

The Union contends that: **(1.)** There are circumstances when the Company's ES liability will be greater than the net reduction of positions defined above; **(2.)** All employees who fall within the scope of article 7 of the JSA are eligible for any and all available ES benefits; **(3.)** The Company's position is unilaterally created and constitutes a violation of article 7 of the JSA in general and article 7.2 thereof in particular.

The Union requests that it be declared that the Union's position in this case is correct and, further, that it be ordered that any and all employees adversely affected by the Company's

position be made whole and be put in the position they would have been in had the Company not erred in taking the position which it did.

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

FOR THE UNION:	FOR THE COMPANY:
(SGD.) WM. BREHL	**(SGD) E. J. MACISAAC**
NATIONAL COORDINATOR	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

E. J. MacIsaac	– Manager, Labour Relations, Calgary
S. J. Samosinski	– Director, Labour Relations, Calgary

And on behalf of the Union:

P. Davidson	– Counsel, Ottawa
Wm. Brehl	– National Coordinator, Ottawa
D. Brown	– Sr. Counsel, Ottawa
H. Helfenbein	– Director, Pacific Region, Medicine Hat

AWARD OF THE ARBITRATOR

At issue in this grievance is the fundamental meaning of the application of certain provisions of article 7 of the Job Security Agreement (JSA), and in particular the conditions which entitle an employee to employment security benefits. The articles pertinent to the resolution of this dispute are as follows:

> **7.1** Except as provided in Article 7A, subject to the provisions of this Article and in the application of Article 8.1 of this Agreement, an employee will have Employment Security (ES) when he has completed 8 years of Cumulative Compensated Service (CCS) with the Company. An employee on laid off status on July 9, 1985 will not be entitled to ES under the provisions of this Agreement until recalled to serviced.
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> **7.2** (a) An employee who has ES under the provisions of this Article who is subjected to lay-off or continuing lay-off as a 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 (ESF) established pursuant to Appendix "E".

…

(d) An employee who occupies a permanent position and who has Employment Security, as defined in Article 7.1 & &.A.1 of the Job Security Agreement, may elect options 1,2, 3 or 4 of Article 7.14 (JSA), if eligible, or employment security payments paid from the Employment Security Fund, when the Company abolishes his/her position for a period of more that one year. Further, for the purpose of this application, employees who elect to receive employment security payments will not be included in the count that triggers payments to the Employment Security Fund in accordance with Article 4.1(d) of Appendix E.

7.3 (a) An employee who has Employment Security under the provisions of this Article and who is affected by a notice of change issued pursuant to Article 8.1 of the Job Security Agreement, shall be required to do the following, on an ongoing basis, provided the employee is qualified or can be qualified in a reasonable period of time, in order to protect his ES:

(1) exercise his seniority on his Basic Seniority Territory (BST) in accordance with the terms of the collective agreement;

(2) fill an unfilled permanent vacancy at the headquarters of the employee in a position represented by the BMWE in which the employee in questions does not have previously established seniority;

(3) fill an unfilled permanent vacancy on the BST of the employee in a position represented by the BMWE in which the employee in question does not have previously established seniority;

(4) fill an unfilled permanent vacancy on the Region of the employee in a position represented by the BMWE in which the employee in question does not have previously established seniority;

(5) exercise seniority on the Region to displace the junior employee holding a permanent position in the classification from which affected at the time of the Article 8 notice. If unable to do so, then, he must displace the junior employee holding a permanent position in any other classification in which he holds previously established seniority. Such employee shall be required to accept recall on his former BST only when permanent work is available. Failure to do so shall result in forfeiture of Employment Security and all seniority on his former BST. In the application of this article, the affected employee shall carry the seniority dates from his previous seniority territory in the classification into which he displaced and all lower classifications or groups;

(6) exercise consolidated seniority on the Region in accordance with Appendix C.

(b) An employee who has Es under the provisions of this Article and is unable to hold a position in accordance with Article 7.3(a) shall be required to exercise the following options provided the employee is qualified or can be qualified in a reasonable period of time to fill the position involved. In filling

vacancies, an employee who has ES must exhaust such available options, initially on a local basis, then on his basic seniority territory, then on the Region:

(1) fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit.

(2) there being none, fill an unfilled permanent vacancy in a position which is not covered by a collective agreement

Note 1: In the application of this Article 7.3(b) and notwithstanding the provisions of the collective agreement to the contrary, an employee who has ES while employed outside the BMWE bargaining unit shall continue to accumulate all seniority in the BMWE. Employees who have taken permanent vacancies outside the BMWE bargaining unit shall be required to accept recall only to a permanent position which his seniority permits him to hold within the BMWE bargaining unit on his BST. If an employee refuses to accept such recall he will forfeit all entitlement to ES and will forfeit his seniority within the BMWE.

Note 2: In the application of this Article 7.3(b), employees on ES shall be ranked for seniority purposes by cumulative compensated service (CCS) regardless of bargaining unit. Vacancies shall be offered to employees on ES status in all bargaining units, in order of CCS, but only the most "junior" (in terms of CCS) shall be required to take the position, first at the location, then on the BST, then on the Region.

(c) An employee who has ES under the provisions of this Article and is unable to hold a position in accordance with Article 7.3(a) or (b), shall be required to fill unfilled temporary or seasonal vacancies, on the Region, in positions represented by the BMWE. Reasonable expenses will be paid for vacancies off the BST. Reasonable expenses will also apply to temporary assignments of under 45 days on the BST.

(d) In the application of this Article 7.3 unfilled permanent, temporary or seasonal vacancies shall mean vacancies which occur after all bulletining and recall provisions of the relevant collective agreements have been exhausted.

(e) An employee who accepts a permanent vacancy outside the BMWE bargaining unit, but within the Company and is unable to hold work as a result of a Technological, Organizational or Operational or a Material (running trades) change within five years will revert back to ES under this plan.

The difference between the parties can be relatively simply stated. The dispute arises by reason of the application of what the Company characterizes as a principle whereby ES opportunities are to be available to the extent that there is a net loss of permanent positions. If, for example, a TO&O changes results in the abolishment of ten

positions, and the occupants of those ten positions are all otherwise eligible to employment security, the Union maintains that if they are unable to hold a permanent position by the exercise of their seniority they are entitled to the protections provided in article 7 of the Job Security Agreement. In the example provided, if none of the ten employees can bid into permanent positions by the exercise of their seniority, or otherwise hold work through the operation of the sequence of obligations provided in article 7.3 of the Job Security Agreement, they are entitled to the benefits associated with ES under the Job Security Agreement.

The Company submits that in the example given if, for example, contemporaneous with the job abolishments, new positions are established which would, in the normal course, be available for bid by the employees displaced by the TO&O change, if those positions are in fact claimed by employees senior to those whose jobs are abolished, employment security protection cannot be available to the extent of the reduction of those job opportunities by the claims of senior employees. In the example given, according to the Company, if ten jobs are abolished, and five jobs are newly established, there is a net loss of five permanent positions, and therefore only five ES opportunities to be available. If the five newly established permanent positions are in fact claimed by employees senior to the employees whose jobs were abolished, as for example by senior employees who might previously have occupied a temporary position, the Company maintains that five of the employees whose jobs were abolished cannot be said to have been adversely affected by the TO&O change. Rather, in its

view, they are adversely affected by the exercise of the seniority rights of senior employees who successfully bid into the newly established positions.

The Company submits that that is consistent with a purposive view of the Job Security Agreement. It argues that to interpret its provisions otherwise could result in the Company being faced with the double obligation of paying employment security benefits to employees displaced from their permanent positions while at the same time being required to hire employees to fill vacancies in temporary positions. In support of its interpretation the Company draws to the Arbitrator's attention a number of prior arbitration awards, including **Ad Hoc 425, CROA 2514, SHP 345, SHP 362, CROA 2289, CROA 2720** and **CROA 3103**.

The Union's representatives submit that there is nothing in the language of article 7 of the Job Security Agreement which would support the "net loss of jobs" theory which the Company seeks to apply in the instant case. They submit that the language of the Job Security Agreement is clear, and essentially describes the obligation placed upon any employee whose job is abolished as a result of a technological, operational or organizational change implemented pursuant to a notice under article 8.1 of the Job Security Agreement. There is no basis, they argue, for effectively treating an employee whose job is abolished as not being entitled to the benefits of employment security under article 7 of the agreement merely because he or she is unsuccessful in bidding a new permanent position by reason of the competing bids of senior employees.

Upon a careful consideration of the submissions, the Arbitrator is compelled to agree with the Union. In coming to that conclusion it is important to appreciate the distinction between the instant case and a number of the precedents relied upon by the Company. A number of those awards, for example **Ad Hoc 424** and **CROA 2514** concern job security protections negotiated on a "one off" basis in the form of special agreements fashioned to deal with the adverse impact of a TO&O change in the case on non-operating employees and a material change in the case of running trades employees. In those circumstances, once the notice of job abolishments is provided to the bargaining agent the company and the union engage in a process of negotiation to reduce the adverse impact of the company's initiative. The arbitrator's decisions confirm the principle that, in that context, in assessing the overall adverse impact the parties can and should take into account the real net loss of jobs, having regard to such factors as normal workplace attrition, for example through death and retirement. Those factors properly come into play in considering what measures are appropriate to mitigate the adverse impact of the company's initiative, for example by the offering of early retirement opportunities and bridging packages.

The instant case presents a very different situation. For reasons they best appreciate, the parties to the instant collective agreement have negotiated a standing job security arrangement which automatically comes into application upon the implementation of an article 8.1 notice relating to technological, operational or organizational change having adverse effects on employees. While the provisions of

article 8 of the Job Security Agreement do contemplate the possibility of the parties negotiating the terms of a special agreement, they do so only to the extent that the items under discussion are “other than those specifically dealt with in this Agreement”, as reflected in article 8.4. Significantly, that article concludes by stating that any items which may be negotiated “… shall not include any item already provided for in this Agreement.”

It is in that context that the rights and obligations provided under article 7 of the Job Security Agreement must be understood. There must, of course, be a causal relation between an employee’s layoff and the change introduced by the Company. That is clear from the language of article 7.2(a) which provides that eligibility for Es payments must be the result of a layoff or continuing layoff “… as the result of a change introduced through the application of article 8.1 of the Job Security Agreement.” As the Company would have it, the causal analysis would disentitle certain employees from ES entitlement following the abolishment of their jobs, where it can be shown that there is an intervening event, in this case the return to the bidding process for permanent positions of senior employees previously holding temporary positions. The Arbitrator cannot agree.

As is evident from the language of article 7.3(a) the ability of an employee to hold and benefit from the extraordinary protections of employment security is conditioned upon the obligation to protect work through an elaborate sequence of seniority bidding opportunities. The first obligation under article 7.3(a)(1) is that the employee must

exercise his or her seniority rights on the employee's Basic Seniority Territory, in accordance with the terms of the collective agreement. In the Arbitrator's view by adopting that language the parties must be taken to have recognized the vagaries and uncertainties of any seniority driven bidding process. They must, in other words, be taken to have appreciated that in the exercise of seniority rights, including the exercise of seniority in the context of a general bidding situation or "town hall" bidding process which involves the creation of new positions after an article 8.1 notice, the elections of other employees senior to a given individual may impact the ability of that individual to exercise his or her seniority rights to protect work in a permanent position. There are, very simply, no qualifications attached to the obligation of the employee to exercise his or her seniority rights to the best of their ability. The failure to be able to hold work after the exercise of seniority then compels the employee to follow the sequence of obligations provided under article 7.3. Nowhere is there language which directly or indirectly can be taken to intend that the employee's obligations or, conversely, the employee's entitlement to employment security protections, are in any way abrogated by the overall dynamics of the bidding process.

In the Arbitrator's view the better approach to the situation giving rise to this dispute is to say that the employee who loses his or her position by reason of an article 8.1 notice does not subsequently lose anything more by reason of the strength of their ability to exercise seniority rights as against other employees, since that very process is recognized as part of the sequence of events inherent in the protection of ES rights for any employee. The Arbitrator cannot agree with the Company that in that particular

context the bids of other more senior employees are tantamount to a supervening event which effectively defeats the employee's entitlement to employment security, notwithstanding that his or her permanent position has clearly been abolished by an article 8.1 notice. A conclusion so contrary to the very premise of the ES obligations and entitlements would require clear and unequivocal language to support it.

The Arbitrator well appreciates the perspective which motivates the Company's interpretation in the case at hand. Indeed that perspective has been found to have a proper application in the circumstance where parties negotiate a special agreement and fashion employee protections in light of a number of factors, including such elements as attrition. However it should also be recognized that attrition can come into play in the operation of the instant Job Security Agreement, to the extent that the opening of positions by attrition will allow employees to exercise their seniority rights so as to hold permanent positions through the operation of article 7.3(a) of the JSA, thereby reducing the employer's ES burden. On the whole, therefore, I must agree with the representatives of the Union who assert that if the Company wishes to bring a principle of "net job reductions" to bear in the administration of employment security benefits, it must negotiate those adjustments.

For all of the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the interpretation of the Job Security Agreement advanced by the Union is correct, and that the principle of net job reduction which would be applied through the Company's interpretation to limit ES opportunities is not supported on the

language of the Job Security Agreement and would, in its application, constitute a violation of that agreement.

July 20, 2004

(signed) MICHEL G. PICHER
ARBITRATOR