CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3873

Heard in Montreal, Thursday, 11 February 2010

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Claim on behalf of Mr. Daniel Baker.

JOINT STATEMENT OF ISSUE:

In March 2004, the grievor, Mr. Daniel Baker, filled the permanent position of Division Welder in Brandon, Manitoba. The position was vacated by Mr. Vince Paskewitz who had accepted a TP&E supervisor's position. On or about January 12, 2005, Mr. Paskewitz returned to the Division Welder's position. As a result, the grievor went on lay-off and claimed job security benefits pursuant to section 4 of the Job Security Agreement. The claim was denied by way of letter dated April 27, 2005. The letter stated that "your claim is hereby denied on the basis that you are a seasonal employee and your position was reduced following the completion of the regular Track Programs season." A grievance was filed.

The Union contends that: **(1)** The Company's Step II response stated that "the work performed by Mr. Baker between March 15, 2004 and January 12, 2005 was scheduled work as track programs work." In fact, the position the grievor held during that period was a permanent Divisional position; **(2)** At the material time the grievor was neither a seasonal employee nor a TP&E employee. He was an employee who held temporarily a permanent Divisional position; **(3)** In an agreement entered into between the Union and the Company dated June 27, 2005, the parties agreed that "an employee when laid off, need not have held a permanent position in order to be eligible for SUB benefits." **(4)** The grievor satisfied all the conditions for job security eligibility as set out in article 4.1 of the Job Security Agreement. The Company's refusal to pay the grievor job security benefits therefore constituted a violation of article 4.1.

The Union request that the grievor's claim for job security benefits be accepted as valid and that, accordingly, he be compensated for all benefits denied.

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

FOR THE UNION: **FOR THE COMPANY:**

(SGD.) WM. BREHL **(SGD.) D. FREEBORN**
PRESIDENT MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Hein	– Labour Relations Officer, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
B. Lockerby	– Labour Relations Officer, Calgary
M. Goldsmith	– Labour Research Specialist, Calgary
B. Szafron	– General Manager, Engineering Services, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Counsel, Ottawa
G. Doherty	– Director, Brandon
W. Phillips	– Local Chairman, Belleville

AWARD OF THE ARBITRATOR

The issue in the case at hand is relatively narrow. Did the grievor bring himself within the terms of entitlement to receive SUB wage protection pursuant to article 4 of the Job Security Agreement? Article 4.1(i)(a) of the Job Security Agreement provides as follows:

> **Eligibility**
> **4.1 (i)** An employee who is not disqualified under Clause (iii) hereof, shall be eligible for a benefit payment in respect of each Claim Week provided he meets all of the following requirements:
>
> **(a)** He has two years or more of continuous employment relationship at the beginning of the calendar year in which the period of continuous layoff in which the Claim Week occurs began (calendar year shall be deemed to run from January 1st to December 31st);

The Company relies on article 10.1 of the Job Security Agreement which states, in part:

> **10.1** Seasonal employees are defined as those who are employed regularly by the Company but who normally only work for the Company during certain seasons of the year. Articles 4 and 8 of this Agreement shall apply to these employees except that payment may not be claimed by any seasonal employee during or in respect of any period or part of a period of a layoff falling within the recognized seasonal layoff period for such group. …

The Company maintains that the grievor's work history shows a pattern of seasonality and that he has generally been subject to administrative conditions associated with seasonal employment. It highlights his employment record, noting his layoffs, for example, in November of 1995, April of 1996, December of 1997, January of 2001, January of 2004 and January of 2005 in support of its submission that his employment has been of a seasonal nature. The Union counters that while he may have performed some seasonal work in the past, at the time of his work between March 15, 2004 and January 12, 2005, he was an employee temporarily holding a permanent Divisional position. As such, the Union maintains, the grievor could not properly be qualified as a seasonal employee whose layoff would be subject to the seasonal schedules of track programs work, including layoffs.

The Arbitrator finds the position of the Company to be more compelling. In resolving this dispute substance should prevail over form and the case must turn on its specific facts. The instant matter obviously involves the interpretation of article 10.1 of the JSA. That article excludes from the protections of article 4 the seasonal layoff periods of employees "… who are employed regularly by the Company but who normally only work for the Company during certain seasons of the year." That accurately describes the grievor. The material before the Arbitrator confirms that the grievor successfully bid to temporarily hold a Divisional position, a job which was clearly not of itself "seasonal" in nature, but which had been temporarily vacated by a senior employee who opted to take a seasonal supervisor's position. The incumbent, Mr. Paskewitz, was placed in a relief supervisory position as a TP&E supervisor, and at the conclusion of the TP&E season he reverted back to his permanent welder's position,

which Mr. Baker had temporarily occupied. It was then that Mr. Baker was laid off and claimed the supplemental unemployment benefits which are the subject of this grievance.

Can it be said that Mr. Baker was, in effect, a seasonal employee as that concept is understood within article 10.1 of the JSA? The Union submits that the article is directed to employees who work seasonally, who can anticipate recognized seasonal layoffs at the conclusion of their work season. That, for example, would obviously describe employees assigned to extra gangs during the summer maintenance season who can be expected to be laid off at the conclusion of work season in the fall or early winter. This , it argues, is the "… recognized seasonal layoff period" contemplated in article 10.1.

On what basis can it be said that the grievor was a other than a seasonal employee at the time he was displaced? He did not claim the Divisional position from another permanent position, but rather from a background of regular and "normal" seasonal employment. While it is true that in the Divisional position he was not directly assigned to any seasonal gang or seasonal work project, he then held a Divisional position only temporarily. The very condition of his holding that position is that it had been seasonally vacated to allow the permanent incumbent the benefit of a seasonal promotion to a supervisor's position on a TP&E gang whose work would end at the conclusion of the work season. I do not see how the grievor could then be characterized as being in other than a seasonal position, in the sense that he continued to be employed "during certain seasons of the year", as contemplated in article 10.1 of the JSA. He continued, in other words, to be "normally" employed seasonally, as he always

had. It is significant, I think, that article 10.1 of the JSA speaks to the state of the employee who normally works seasonally, and not to any particular position he or she may hold.

The grievor knew, or reasonably should have known, that he held the Divisional position on a temporary and seasonal basis, it being understood that the permanent incumbent in the job would in all likelihood revert to his permanent position at the end of the TP&E gang's season, as he ultimately did. How can the grievor's holding of the Divisional job in those conditions be characterized as other than both temporary and seasonal, turning as it did on the seasonal movement of the employee he replaced on a temporary basis? I am compelled to conclude that the Company's analysis of the facts, and its conclusion that the grievor was a seasonal employee for the purposes of the JSA is correct. To conclude otherwise would favour form over substance in a manner inconsistent with the intention of the parties as expressed through the JSA.

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

February 19, 2010

(signed) MICHEL G. PICHER
ARBITRATOR