CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4528

Heard in Montreal, January 11, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Claim on behalf of Mr. Brandon Hale.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On May 15, 2015, a grievance was filed that took the position that a violation of the Job Security Agreement had occurred as a result of the Company's decision to deny the grievor, Mr. Brandon Hale, a severance payment pursuant to the JSA. The grievor's request for a severance followed the abolishment of his permanent Leading Track Maintainer's position at Ignace, Ontario on March 23, 2015 as a result of a Technological, Operational and Organizational change implemented pursuant to the JSA.

The Union contends that:

1) the Company has violated section 4.13 of the Job Security Agreement.

The Union requests that:

It be ordered that the Company pay the grievor the severance amount provided for in section 4.13 of the JSA. Further, the Union requests that the grievor be fully compensated for all wages and benefits lost as a result of the Company's erroneous interpretation and application of the JSA.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Doherty	**(SGD.)**
President	

There appeared on behalf of the Company:

C. Clark – Assistant Director Labour Relations, Calgary

And on behalf of the Union:

G. Doherty – President, Ottawa
D. Brown – Counsel, Ottawa

AWARD OF THE ARBITRATOR

The grievor, Mr. Brandon Hale, began working for the Company on June 27, 1988. During the time up to the dispute, the Grievor was working as a Leading Track Maintainer (hereinafter: “LTM”) at Ignace, Ontario.

On October 27, 2014, the Company served the Union what is known in the industry as an Article 8 Notice. Article 8.1 of the Job Security Agreement (hereinafter: “JSA”) forces the Company to inform the Union at least 120 days in advance of any Technological, Operational or Organizational (“T/O/O”) change of a permanent nature which will have adverse effects on employees.

The aforementioned October 27 notice stated that the T/O/O change would be implemented on or about February 26, 2015. It provided for the abolishment of 238 permanent positions across the country and the establishment of 131 positions for a net loss of 107 positions.

On January 19, 2015, the Company sent the Union another letter stating that the implementation of the Article 8.1 change would be delayed until either March 22, 23, or 24, 2015 depending on the work cycles of the positions being established. The implementation effectively began on March 23, 2015.

Also on January 19, 2015, as part of the implementation process, the Company and the Union made joint presentations to employees to inform them about the upcoming changes and what their rights and responsibilities were. One of the issues discussed was the possibility that affected employees might receive severance packages as per Article 4.13 of the JSA. Article 4.13 states that:

> "**4.13 (a)** In cases of permanent staff reductions, an employee with two years or more of continuous employment relationship at the beginning of the calendar year, may, upon submission of formal resignation from the Company's service, claim a severance payment as set forth below but such severance payment will not in any event exceed the value of one and one-half year's salary at the basic rate of the position held at the time of abolishment, displacement or layoff.
>
> **(b)** For each of Cumulative Compensated Service or major portion thereof calculated from the last date of entry into the Company's service as a new employee, an employee will be allowed credit weeks as follow :
>
> - For each of the first seven years – one week's pay.
>
> - Eight or more years of service – 2.25 weeks of pay for each of compensated service.
>
> **(c)** An employee choosing to sever within the first week following lay-off would be entitled to the full severance as provided by the above severance formula."

Having attended one of the meetings, the Grievor submitted his resignation on March 27, 2015, less than a week following lay-off. However, on April 17, 2015, the grievor received a phone call from the Company advising him that an "error" had been made and that he was not going to receive the severance payment as per Article 4.13 JSA. Mr. Hale was told to contact his Union representative.

During the following days, the Union and the Company discussed the Grievor's case. On April 24, 2015, the Company sent an email explaining that Mr. Hale was not eligible for a severance payment and offered the Grievor to return to service without prejudice. On April 28, 2015, a conference call was held during which the Company reiterated that the grievor was not going to receive the severance payment but that the Company was willing to return him to service.

On May 4, the Company sent the Union a draft agreement which provided that the Grievor would be reinstated without compensation, but with a two weeks' replenish of his annual vacation bank.

The Grievor and the Union being unsatisfied with the Employer's proposal, filed a grievance.

On June 19, 2015, the Company responded to the Union's grievance and stated that Mr. Hale did not hold a permanent position on March 23, 2015 and that he, therefore, was not eligible for Job Security protection and not eligible for severance pay, as supported by Arbitrator Picher's ruling in **CROA&DR 2720**. Furthermore, the Company sustains in its response:

> "[…] Mr. Hale temporarily held Marshal Hyatt's permanent position of LTM Ignace #3 and upon its abolishment, Mr. Hale was required to fulfill his obligations under Article 11.3 (a) up to and including displacing a junior employee in a permanent position.
>
> Should the Union be able to demonstrate that Mr. Hale was, in fact, eligible for Job Security protection, the Company's position remains that he was not eligible for severance pay. Mr. Hale's temporary LTM

> Ignace #3 position was abolished; however, he had the ability to exercise his seniority rights and had he done so, would have been able to hold a permanent and/ or temporary position. As such, Mr. Hale would not have been subject to layoff which is a fundamental requirement of Article 4.13."

The essence of this grievance revolves around the question of whether the position held by Mr. Hale was permanent or not, thus granting him the possibility of severance pay.

Concerning the status of the Grievor, the facts are undisputable. In early 2014, the position of permanent LTM on the Ignace #3 Section Crew was held by Mr. Marshall Hyatt. The latter bid out of that position to another position, that of temporary Foreman on the same Crew. The vacated LTM position was then put up for bid temporarily and awarded to Mr. Dominic Venditti. However, in the meantime, the grievor decided to displace into the LTM position after his temporary Snowfighter position came to an end. On May 26, 2014, Mr. Venditti arrived to fill the position but could not do so since the Grievor was of higher seniority than him.

Mr. Hale then decided that he wished to assume the LTM position permanently. Since he was senior to the position's incumbent, Mr. Hyatt, the grievor had every right to do so. Therefore, the position became that of the Grievor since he asked for it.

It is not contested that when such situations arise, the employee desiring to assume the position permanently need only to declare that the position is now his. The Grievor did so verbally to Roadmaster Dale Peters on May 26, 2014.

The Grievor continued to work as LTM without any issues arising. However, in late November 2014, Mr. Hale noticed that the incumbent listed as the LTM at Ignace was still Mr. Hyatt. The Grievor then wrote a letter to both the Company and the Union to inform them of the mistake. He specified that he declared on May 26, 2014, that he wished to occupy the permanent position of LTM.

Having heard nothing from the Company thereafter, Mr. Hale assumed that the mistake had been corrected, but he discovered in January 2015 that Mr. Hyatt was still listed as holding the position of LTM at Ignace.

The Grievor then went on to write a second letter to the Company, dated January 16, 2015, parts of which read as follow:

> "Having not owned a permanent position previously, I exercised my seniority under the Wage Agreement, No. 41 & 42 between Canadian Pacific Railway and the Teamsters Canada Rail Conference Maintenance of Way Employees Division, Section 11.3, (a) page 105, to displace a junior employee in a permanent position. […]
>
> Marshall Hyatt held the permanent at the time I exercised my seniority. I was not requested to provide any further formal correspondence, and was given no reason to believe my intentions had been misunderstood in any way by either the Roadmaster, the Union, or the affected employees. I relocated my primary place of residence from Thunder Bay, Ontario to Ignace, Ontario, for the permanent position. I expected that the records would be updated accordingly, however, as per the most recent position notifications released, such was not done."

Article 11.3(3) reads, in part, as follow:

> "**11.3(3)** […] In the Event of displacement or lay off from a temporary position prior to filling the conclusion of a temporary vacancy

> employees, who hold a permanent position, will not be allowed to displace to other permanent positions in the circumstances where he/she can exercise any of the 3 options listed immediately above. However, in situations where the employee does not own a permanent position […], [he] will be allowed to exercise his established seniority to displace a junior employee in a permanent position." [Emphasis added]

Indeed, the Grievor did not own a permanent position when filling for the Ignace LTM position. Thus, when his temporary position as Snowfighter came to an end, Mr. Hale had the right to fill the LTM position permanently, in accordance with article 11.3(3) cited above, as he was senior to Mr. Hyatt.

Therefore, when the Article 8 change was implemented in March 23, 2015, the Grievor was fully entitled to the benefits of the severance package provided by the JSA under article 4.13(a). Said article (cited above) imposes the following requirements for entitlement: the reduction of a permanent position, at least two years of continuous service and the submission of formal resignation from the Company.

Also of note, Article 4.13(c) requires the employees to submit their resignation within the first week of the layoff in order to receive the entirety of the severance package. As mentioned earlier, Mr. Hale had submitted his resignation on the 27th of March, after being laid off on the 23rd of the same month, making him entitled to the whole of the severance package as per article 4.13 of the JSA.

In **CROA&DR 2200**, the grievor had resigned from the company before the implementation date set in the article 8 notice, which made arbitrator Picher state that: "The effective thrust of article 4.13, therefore, is that the right of an employee to claim severance payments matures only when his or her position had in fact been abolished." Such is the case here: Mr. Hale was holding the permanent position of LTM at Ignace when he was laid off, which makes him clearly eligible for the severance package of the JSA.

The Company claims that in any event, Mr. Hale was clearly not listed as LTM of Ignace in the Article 8 change notice and that, as such, he is not entitled to a severance package. With all due respect, this argument cannot be reasonably accepted. The evidence clearly shows that the Grievor exercised his seniority to replace Mr. Hyatt's position and that he expressed the desire to hold this position permanently as early as May 2014. When Mr. Hale noticed that the Company failed to update its records, he sent letters twice informing his Employer of the mistake, without result as can be seen in the Article 8 notice.

During that time, the Company never contested the Grievor's exercise of his rights under article 11.3(3) of the JSA, it simply failed to correct its erroneous records. The assertion to the effect that the Grievor was not the one listed on the article 8 notice and that therefore he is ineligible to received his severance package is wrong both in law and in facts. It has been shown that the Grievor has indeed exercised his seniority to occupy the permanent position of LTM and was still holding it when he was laid off on

March 23, 2015. As such, he met all the requirements of article 4.13 of the JSA and thus was rightfully entitled to his severance package. The Company cannot invoke its own negligence and repeated administrative mistakes to refuse the Grievor's claim.

In regards to the argument made by the Company that the Grievor should have had grieved the lack of change in the Company's list, it is too late to make such a claim at this stage of the grievance, since no such objection to the statement of issue has ever been filed before and that the Employer was made aware of its mistake well before the implementation of the reduction plan. Indeed, Paragraph 14 of the CROA&DR Memorandum effectively provides that:

> "The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions."

Also, CP Rail asserts that the Grievor should have exercised his seniority before exercising his right to a severance package, as per article 4.13 of the JSA. With all due respect, I do not share the Company's interpretation of article 4.13, which plainly states the conditions to receive a severance package, all three of which are met by the Grievor. Moreover, the Company's own documents and the joint representations of January 19, 2015, contradict the Employer's reading of the article in question, by stating that the prior exercise of seniority is, in fact, not a prerequisite.

For all the above-mentioned reasons, the Grievance is allowed. The Company is to pay Mr. Hale the full severance amount as per article 4.13 of the JSA, with interest. I reserve jurisdiction for any difficulty that may arise from the application of this decision.

January 17, 2017

MAUREEN FLYNN
ARBITRATOR