CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2321
Heard at Montreal, Tuesday, 9 February 1993
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
UNITED TRANSPORTATION UNION
EX PARTE
DISPUTE:
Entitlement to Maintenance of Earnings payments as provided for in article 8 of the Memorandum of Agreement, dated 29 June 1990.
UNION'S_STATEMENT_OF_ISSUE:
On 29 June 1990, the Arbitrator appointed by the Minister of Labour at the request of the parties, rendered his award. Provisions were made in this agreement to maintain the basic weekly pay of protected freight employees who were adversely affected by the Arbitrator's award.
In March 1991, the Union filed a policy grievance with the Vice-President of the Great Lakes Region. The Union claims that Engine Service Employees who returned to the ranks of the 4.16 Agreement subsequent to the implementation of the Arbitrator's award, are entitled to Maintenance of Earnings protection under Article 8 of the Arbitrator's award, because they are adversely affected by the Award.
The Company has denied all maintenance of earnings claims from Engine Service Employees who were not covered by the 4.16 Agreement on the date of implementation even though these employees were adversely affected by the award subsequent to the implementation date.
FOR THE BROTHERHOOD:
(SGD.)_M._P._GREGOTSKI
GENERAL CHAIRMAN
There appeared on behalf of the Company:
D. L. Brodie
System Labour Relations Officer, Montreal
D. W. Coughlin
Manager, Labour Relations, Montreal
E. A. Sims
Assistant Manager, Crew Management Centre, Toronto
And on behalf of the Brotherhood:
R. A. Beatty
Vice-General Chairman, Hornepayne
D. Dowdell
Vice-Local Chairman, Belleville
C. Hamilton
General Chairman, BLE, Kingston
C. McFadden
Grievor
D. Ritarose
Grievor
A. Cairns
Grievor
R. Dyon
Grievor
D. K. Capstick
Grievor

AWARD_OF_THE_ARBITRATOR

The issue before the Arbitrator is whether the grievors, some fifteen persons who were assigned as engine service employees at the time of the memorandum of agreement respecting the freight crew consist, fall within the protections of article 8 of that agreement. article 8 confers upon eligible employees maintenance of earnings benefits. It provides, in part, as follows:

QQINDENT 8.1 QQINDENT The provisions of this Article 8 shall apply only to protected freight employees - A and protected freight employees - B.

QQINDENT 8.2 QQINDENT The basic weekly pay of protected freight employees - A or protected freight employees - B whose positions are abolished or who are displaced through the application of this Memorandum of Agreement shall be maintained by payments to such employees of the difference between their actual earnings in a four-week period and four times the basic weekly pay. Such difference shall be known as an employee's incumbency. In the event an employee's actual earnings in a four-week period exceeds four times their basic weekly pay, no incumbency shall be payable. An incumbency for the purpose of maintaining an employee's earnings shall be payable provided: ...

It is common ground that for certain purposes of the memorandum of agreement the grievors are protected freight employees - A and protected freight employees - B, as the case may be, depending upon their seniority. It is also common ground that at the time of the implementation of the memorandum of agreement they were not working as trainmen but, rather, were in service as locomotive engineers, in accordance with their qualifications and seniority for such work. The representations before the Arbitrator establish that in fact all of the grievors have, over the past three years, worked preponderantly as enginemen, although they revert periodically to the trainmen's spareboard, particularly in the early part of each year when there are seasonal declines in rail traffic.

The Union submits that the grievors are disadvantaged as compared with other protected freight employees, inasmuch as they have been denied maintenance of earnings protection for such time as they are set back to the trainmen's spareboard. It submits that it is inequitable that the grievors should work the spareboard without maintenance of earnings protection, in circumstances where work opportunities have been reduced by the crew consist agreement, while other protected freight employees, some of whom may be junior to them, have the benefit of maintenance of earnings while they are in spareboard service.

The position of the Company is that employees can have the benefit of maintenance of earnings under article 8 of the memorandum of agreement of July 19, 1990 only if it can be established that they were adversely affected in a trainman's position at the time of the implementation of the agreement. In other words, in the Company's view, the protections of article 8 of the memorandum of agreement are available only to trainmen who were on the spareboard at the time of the implementation of the agreement in July of 1990. It submits that because the grievors' return to the spareboard was occasioned by a reduction in work opportunities in service as enginemen, a matter unrelated to the crew consist agreement, they are not adversely affected and do not fall within the purview of article 8 of the memorandum of agreement. Further, the Company asserts that to the

extent that a number of the grievors in fact had general increases in their total personal earnings, year over year, they could not be said to have been adversely affected in any way.

The Arbitrator has some difficulty with the positions advanced by the Company. Firstly, it is difficult to draw any conclusion from the annual earnings of any of the grievors in a given year to determine whether or not they have been adversely affected by the implementation of the crew consist agreement. It may well be, for example, that the losses incurred by an employee set back to spareboard service as a trainman are substantially surpassed by earnings which he or she makes subsequently in service as a locomotive engineer. In the Arbitrator's view, the concept of adverse impact for the purposes of the memorandum of agreement must be confined to the work opportunities and earnings of an employee while in spareboard service as a trainman, and cannot be affected by earnings from work opportunities arising incidentally outside the collective agreement.

It is clear that the grievors fall within the provisions of article 8.1 of the memorandum of agreement. Each of them is a protected freight employee within the purview of that provision. While the Arbitrator must agree with the Company, that on the face of the language of article 8.2, that provision would not appear to apply to the grievors, it is necessary to go further to understand the intention of the parties with respect to the implementation of the freight crew consist as it applies to spareboard employees. That intention is perhaps best reflected in a letter addressed to the General Chairperson of the Union by the Company's Manager of Labour Relations, dated May 27, 1991. That letter reads, in part, as follows:

QQINDENT This concerns your letter of March 28, 1991, and our numerous subsequent discussions, concerning the matter of maintenance of earnings protection for protected freight employees on the spare board as awarded by Arbitrator M.G. Picher in his Supplementary Award in respect of freight crew consist.

QQINDENT In our letter of March 5, 1991, specifically in Appendix 7 thereto, we pointed out that the establishment of maintenance of earnings protection for spare board employees was an entirely new principle. Prior to Arbitrator Picher's award the parties had operated on the principle that the level of earnings for spare board employees is subject to fluctuation for a multitude of reasons and that, in most cases, a loss of earnings cannot be ascribed to any particular, definable cause.

QQINDENT However, in respect of Mr. Picher's award and the Memorandum of Agreement of July 19th, 1990, there clearly has been a QQBOLD_definable_loss_of_work_for_protected_freight_employees_on_the_spare_board_in_that_they_no_longer_retain_entitlement_positions_which_have_been_permanently_discontinued._..._QQBOLD

QQINDENT (emphasis added)

In light of the foregoing, it is clear that persons in the position of the grievors, who are compelled to move from engine service to spareboard trainmen's positions have in fact suffered a disadvantage by the implementation of the reduced crew consist. Prior to the memorandum of agreement A and B protected freight employees returning to the trainmen's spareboard were called to work on "reduced positions" ahead of employees who did not have protected status. After the implementation of the agreement, however, with the elimination of the reduced positions, their access to work is diminished, as they stand in rotation with all other employees. It was in recognition of that loss, reflected in the correspondence reproduced above, that the parties agreed on a formula for maintenance of earnings for trainmen on the spareboard. That is so notwithstanding that they might not, strictly speaking, be described as persons whose positions were abolished, who were displaced, through the application of the memorandum of agreement as contemplated in article 8.2.

The grievors are employees with full rights under the collective agreement, and the memorandum of agreement. Their status as protected freight employees A and protected freight employees B is vested by virtue of the agreements of the parties and their own service to the Company. On what basis can it be concluded that they were intended to have lesser protections than those enjoyed by other protected freight employees A and B when they return to spareboard service as trainmen? It cannot be denied, I think, that at that point in time they are indeed adversely impacted by the memorandum of agreement, as positions to which they could previously lay claim on a preferential basis were in fact abolished. It is, I think, difficult to conclude that the parties would have intended to preclude access to maintenance of earnings protection to a protected trainman who, for example, was temporarily set up as an engineman for a two week period at the time of the implementation of the reduced crew consist agreement. In principle, there can be little difference if his engineman's service was for two months, or two years, as long has he retains the vested status of a protected trainman. There is nothing in the language of the collective agreement, or of the memorandum of agreement which has been drawn to the Arbitrator's attention which limits the point in time at which an employee must first experience the adverse impact of the freight crew consist before he or she can claim the protections of the memorandum of agreement. What the case at hand discloses is, in my view, a circumstance of a delayed impact whereby the grievors return to the spareboard to work opportunities which are substantially lessened solely by the implementation of the freight crew consist agreement.

The spirit which underlies that agreement is that the Company should be allowed, on the one hand, to realize certain efficiencies and productivity gains through manpower deployment over the long term, chiefly by attrition, while on the other hand employees with protected status should be provided certain defined protections against the adverse impacts of that change. One of the considerations expressed by the Union in the arbitration which led to the memorandum of agreement was that protected employees should not be compelled to move from one terminal to another in the exercise of their rights. In light of the acceptance of that principle by the Arbitrator, it is difficult to give credence to the submission of the Company that the grievors in the case at hand had the option of moving to other locations to continue working as locomotive engineers, as a means of avoiding the adverse impact of returning to a spareboard with diminished work opportunities. On the whole, I can find nothing in the spirit or in the letter of the memorandum of agreement to support the interpretation advanced by the Company.

For the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the grievors are entitled to the maintenance of earnings claims filed, and to continued protection in that regard, while in spareboard service as trainmen, pursuant to the terms of article 8 of the memorandum of agreement. The parties may speak to the issue of compensation, should it be necessary to do so.

February 12, 1993

(Sgd.)_MICHEL_G._PICHER

ARBITRATOR