

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2341
Heard at Montreal, Wednesday, 10 March 1993
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DISPUTE:

Whether, as a result of the expiration of the Newfoundland Special Agreement, certain employees represented by the Brotherhood are required, pursuant to Article 7 and Appendix ``G'' of the Employment Security and Income Maintenance Agreement (The Plan) dated April 21, 1989, to exercise their consolidated seniority date for displacement purposes into temporary positions in Agreement 10.1 and Agreements Supplemental thereto.

JOINT STATEMENT OF ISSUE:

Employees eligible for employment security who are adversely affected by a technological, operational or organizational change of a permanent nature are required to exhaust their seniority rights pursuant to Article 7.3(a) of The Plan, i.e., exercise, in accordance with the terms of the collective agreement, their maximum seniority rights at the location, area and region.

Such employees still unable to hold work would then be required, under item 7 of Appendix ``G'' of the Employment Security and Income Maintenance Agreement dated April 21, 1989, to exercise their consolidated seniority rights.

The employees must exercise these rights to any Supplemental Agreement except the one in which they were working when adversely affected by a notice served pursuant to Article 8.1 of The Plan. In 1988, the Company closed the Newfoundland Railway. As part of that Railway's closure settlement, the Company and, among other unions, the B.M.W.E. entered into the ``Newfoundland Railway Special Agreement 1988''. On September 1, 1992, this Special Agreement expired. As a result, certain Newfoundland employees represented by the Brotherhood then became required, at their sole discretion, to exercise their consolidated seniority into Agreement 10.1 or Agreements supplemental thereto on the Atlantic Region.

The Brotherhood contends that the clear intentions of the E.S.I.M. Agreement is that, in the exercise of consolidated seniority, employees with employment security are required only to exercise their consolidated seniority into permanent positions.

The Company disagrees with the Brotherhood's contention and maintains that failure of these employees to exercise consolidated seniority to temporary and/or permanent positions on the Atlantic Region results in forfeiture of their consolidated seniority and employment security.

FOR THE BROTHERHOOD:

FOR THE COMPANY:

(SGD.) R. A. BOWDEN

(SGD.) D. C. ST-CYR

SYSTEM FEDERATION GENERAL CHAIRMAN

for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. C. St-Cyr

Manager, Labour Relations, Montreal

R. Lecavalier

Counsel, Montreal

K. R. Peel

Assistant Regional Counsel, Toronto

And on behalf of the Brotherhood:

D. B. Brown

Senior Counsel, Ottawa

P. Davidson

Counsel, Ottawa

R. A. Bowden

System Federation General Chairman, Ottawa

R. Phillips

General Chairman, Ontario

AWARD OF THE ARBITRATOR

In the Arbitrator's view the following provisions of Appendix G of the Employment Security and Income Maintenance Plan (ESIMP) are instructive to the resolution of this grievance:

QQINDENT 7.QQINDENT An employee identified in Items 1 through 5 may exercise his consolidated seniority rights for displacement purposes, including the filling of an unfilled permanent vacancy, if he has exhausted his seniority pursuant to article 7.3(a) of the Plan and is still unable to hold work. Failure to do so will result in forfeiture of consolidated seniority and Employment Security.

QQINDENT NOTE: The filling of an unfilled permanent vacancy will be permitted provided that the employee is qualified or can be qualified in a reasonable period of time.

QQINDENT 9.QQINDENT An employee who has exercised his consolidated seniority rights into another Supplemental Agreement may accept recall for temporary work in his former Supplemental Agreement. Such employee will have his permanent position advertised as a temporary vacancy. Upon the expiration of the temporary work he will be required to return to his permanent position. Failure to do so will result in forfeiture of his consolidated seniority and Employment Security.

Nowhere does the text of Appendix G refer to an employee exercising seniority, or consolidated seniority, to a temporary position. In the Arbitrator's view, the language of articles 7 and 8 of Appendix G is, on balance, more consistent with the position advanced by the Brotherhood. Where employees are required to apply their seniority to the filling of vacancies as a condition of protecting their employment security, they are, by the specific language of the provision, compelled to do so only in respect of ``an unfilled permanent vacancy''. Moreover, the language of article 9 appears to reflect an understanding that an employee who has exercised his or her seniority rights into another supplemental agreement will occupy a permanent position. That is the conclusion that must, I think, be drawn from the sentence which provides that upon the expiry of temporary work the employee is required to return ``to his permanent position.'' Absent any contrary indication in Appendix G, the most compelling conclusion is, in the Arbitrator's view, that the parties understood that the position to which an employee would have moved in the exercise of his or her consolidated seniority rights must be a permanent position.

Moreover, the language of Appendix G is consistent with the theme reflected in article 7.3(b) of the ESIMP. In that article there are several steps whereby an employee is compelled to fill ``an unfilled permanent vacancy'' within several larger concentric circles of work jurisdiction and seniority groups, up to and including other collective agreements and other unions, and ultimately to positions not covered by a collective agreement. In each instance, only permanent vacancies are identified. The Arbitrator has difficulty understanding the submission of the Company which, implicitly, involves the assertion that the parties intended employees to exercise their consolidated seniority to displace employees holding temporary positions, while there is no parallel obligation to fill unfilled temporary vacancies. In the Arbitrator's view that result does not flow from an oversight, but from a rational and consistent recognition that employees who have gained a right as significant as employment security should not see that right undermined or jeopardized by being forced to assume a temporary position at the conclusion of which they might face a lay off for reasons unrelated to a technological, operational or organizational change, thereby forfeiting their employment security protection. The far-reaching consequences implicit in the Company's position should be supported by clear and unequivocal language. No such language is to be found in Appendix G to the ESIMP. For the reasons related above, the language reflected in that document is more supportive of the position advanced by the Brotherhood.

For the foregoing reasons the grievance must be allowed. The Arbitrator finds and declares that the failure of employees who were subject to the Newfoundland Special Agreement to exercise consolidated seniority to temporary positions on the Atlantic Region does not result in the forfeiture of their consolidated seniority and employment security.

March 12, 1993

(Sgd.) MICHEL G. PICHER

ARBITRATOR