CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2544
Heard in Montreal, Thursday, 10 November 1994
concerning
Canadian Pacific Limited
and
Brotherhood of Maintenance of Way Employees
DISPUTE:

Commuting allowance payable to employees under Article 6.10 of the Job Security Agreement.

JOINT STATEMENT OF ISSUE:

Effective January 1, 1991, the benefit level was $165 per month. As of April 29, 1992, the monthly allowance was increased to $180. Several employees on the Edmonton Seniority Territory began receiving the allowance of $165 as of March 30, 1992. The allowance remained at $165 for these employees subsequent to April 29, 1992.

The Union contends that the Company has violated Article 6.10 and Article 14.1 of the Job Security Agreement.

The Union requests that all employees on the Edmonton Seniority Territory receiving the $165 monthly allowance prior to April 29, 1992 be paid the $180 monthly allowance subsequent to that date.

The Company denies the Union's contentions and declines the Union's request. The position of the Company is that the negotiated increase of April 29, 1992 to the Commuting Allowance applies only to employees who begin to receive the allowance on or after that date.

FOR THE BROTHERHOOD: FOR THE COMPANY:
(SGD.) D. McCracken (SGD.) C. E. Minto
System Federation General Chairman General Manager, Operations & Maintenance

There appeared on behalf of the Company:
D. T. Cooke – Manager, Labour Relations, Montreal
S. J. Samosinski – Director, Labour Relations, Montreal
R. A. deMontignac– Manager, Benefits, Montreal
D. L. Johnson – Benefit Plans Officer, Montreal
And on behalf of the Brotherhood:
P. Davidson – Counsel, Ottawa
D. McCracken– Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

The Brotherhood alleges violations of articles 6.10 and 14.1 of the Job Security Agreement which provide as follows:

6.10 If an employee who is eligible for moving expenses does not wish to move his household to his new location he may opt for a monthly allowance of $180 which will be payable for a maximum of twelve months from the date of transfer to his new location. Should an employee elect to transfer to other locations during such twelve month period following the date of transfer, he shall continue to receive the monthly allowance referred to above, but subject to the aforesaid 12 month limitation. An employee who elects to move his household effects to a new location during the twelve month period following the date of his initial transfer will only be eligible for relocation expenses under this article

for one such move and payment of the monthly allowance referred to above shall terminate as of the date of his relocation.

14.1 Payment of benefits under this Agreement shall commence on the 29th day of April, 1992, the 27th day of October, 1992, for RCTC and the 22nd day of December 1992, for CPPA.

The facts underlying the grievance are not in dispute. On March 30, 1992 a number of employees on the Edmonton Seniority Territory began to receive a commuting allowance as a result of an Article 8 notice served under the Job Security Agreement. The notice in question was served effective March 27, 1992. The amount paid to the employees was $165.00 per month, in accordance with the rate provided in the Job Security Agreement dated April 21, 1989.

The provision for the commuting allowance has been part of the Job Security Agreement for many years. The amount of the allowance has been revised upwards on a regular basis with the renegotiation of the Job Security Agreement. The record before the Arbitrator establishes, for example, that increases in the allowance were negotiated in 1978, 1979, 1982, 1985, 1988, 1989 and, finally in 1992, when the instant dispute arose. On March 22, 1992 a memorandum of settlement between the parties included an agreement to raise the amount of the commuting allowance to $180.00 per month. The memorandum of agreement of March 22, 1992 was subject to ratification, and following ratification the agreement came into effect on April 29, 1992. The Company takes the position that the increased commuting allowance applies only to employees who commenced to receive the allowance on or after April 29, 1992. It submits that the grievors, whose payments commenced before that date, are to be paid at the rate of $165.00 per month, provided under the Job Security Agreement of April 21, 1989, for the full period of their entitlement. The Company submits that its position is in keeping with a long-standing protocol between the parties whereby employees continue to receive commuting allowance at rates in effect at the time they are first impacted by an Article 8 notice.

The Brotherhood submits that there is nothing on the face of the Job Security Agreement, or of the memorandum of settlement, to suggest that the parties intended to limit the application of the increased commuting allowance to employees whose entitlement began under the prior Job Security Agreement. Further, its counsel stresses that the employees who are the subject of this grievance received their Article 8 notice after March 22, 1992, the date of the signing of the memorandum of agreement. On that basis he submits, in the alternative, that they should be viewed as entitled to the protections of the new rate. The Company replies that, as reflected in article 14.1, the effective date of the new Job Security Agreement for the payment of benefits is April 29, 1992, a date which occurred after the implementation of the Article 8 notice in respect of the grievors.

If this matter were to be resolved solely on the basis of the language of the Job Security Agreement, the position of the Brotherhood would be compelling. There is nothing on the face of the agreement which would suggest that the increased commuting allowance should not be available to all employees receiving such an allowance, at least as of April 29, 1992. There is, however, more to consider. The uncontradicted evidence advanced by the Company discloses that it has been consistent policy and practice

to limit the payment of commuting allowance to the rate provided in the Job Security Agreement which is in effect at the time employees are made the subject of an Article 8 notice. Its representatives confirm to the Arbitrator that in numerous rounds of bargaining for the renewal of the Job Security Agreement unions have made demands that the newly negotiated commuting allowance rates should apply to employees already in receipt of such allowances at the time a new Job Security Agreement comes into effect. That demand was always rejected by the Company and, over some seven renewals of the Job Security Agreement between 1978 and 1992, it has consistently applied the rates in the manner which it did to the grievors in the case at hand. In other words, as the Article 8 notice affecting them occurred prior to April 29, 1992, they are to continue to receive, for the full period of their entitlement, commuting allowance at the rate of $165.00 per month, in accordance with the terms of the Job Security Agreement of April 21, 1989, which was in effect at the time of the Article 8 notice affecting them. Upon being questioned by the Arbitrator the Company's representatives confirmed that there was no direct discussion of this issue at the renewal of the current Job Security Agreement. In other words, the issue was not brought up by the Brotherhood, or any other union at the table. The evidence is clear, however, that the practice described above is long standing, notwithstanding demands by the unions made on a number of occasions over the years.

If it were necessary to so find, I would conclude that, at a minimum, a latent ambiguity is established in the evidence with respect to the payment of the allowance in question when such payment overlaps the implementation of a new Job Security Agreement. In that regard the extrinsic evidence would support the position advanced by the Company with respect to the understanding between the parties as to the formula to be applied. Alternatively, it would appear to the Arbitrator that the Brotherhood cannot rely upon its silence during the course of the most recent renewal of the agreement to now assert a claim based on the strict wording of the Job Security Agreement, notwithstanding the previous practice and understanding. It is well established that silence in the face of a clear expectation as to the operation of the terms of a collective agreement can, of itself, be the grounds for an estoppel (see, e.g., Hallmark Containers Ltd. (1983), 8 L.A.C. (3d) 117 (Burkett); Taggart Service Ltd. (1989), 6 L.A.C. (4th) 279 (M.G. Picher)).

The material before the Arbitrator discloses that for many years the parties operated on the understanding that employees in the position of the grievors would be paid commuting allowance at the rate found in the Job Security Agreement in effect at the time of the Article 8 notice which affects them. The issue was discussed repeatedly at the bargaining table, prior to 1992, and in each instance the unions acquiesced in the position asserted verbally by the Company. Indeed it appears that no grievances were ever filed in respect of the practice, until now. In these circumstances, where there was no discussion of this issue at the bargaining table for the renewal of the Job Security Agreement in 1992, the Brotherhood cannot, having regard to the equitable principle of estoppel, assert a different interpretation or application of the terms of the commuting allowance provision, at

least for the term of the existing Job Security Agreement. Any change in the long-standing understanding and practice with respect to the application of these provisions must be the subject of negotiation at the appropriate time.

For all of the foregoing reasons the Arbitrator cannot find that the Company has violated the terms of article 6.10 and article 14.1 of the Job Security Agreement, as alleged by the Brotherhood. The fact that these grievances have been filed may, of course, be taken as notice by the Brotherhood that it will not be bound by the unwritten understanding previously in place, beyond the term of the existing Job Security Agreement. The grievance must therefore be dismissed.

11 November 1994 _____

MICHEL G. PICHER
ARBITRATOR