CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2591

Heard in Montreal, Tuesday, 14 March 1995

concerning

Canadian National Railway Company

and

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada [CAW-CANADA]

DISPUTE:

The Brotherhood's claim submitted on behalf of J.R. Evong, Checker, Port of Halifax, who was denied maintenance of basic rates protection, in accordance with the provisions of the Employment Security and Income Maintenance Plan dated June 18, 1985, as a result of four employees exercising their maximum seniority from Agreement 5.1 to Agreement 5.62.

JOINT STATEMENT OF ISSUE:

On May 31, 1991, the Company and the Brotherhood signed an agreement dovetailing the seniority of four employees who transferred form Agreement 5.1 into Agreement 5.62, as a result of their permanent positions being abolished through an article 8 notice.

Further to the dovetailing, Mr. J.R. Evong submitted a claim for maintenance of basic rate protection from January 1 to June 7, 1991 inclusive.

The Brotherhood contends that since Mr. Evong was afforded maintenance of basic rate protection prior to the four employees exercising their seniority into Agreement 5.62, the Company cannot now alter Mr. Evong's maintenance of basic rate protection. The Brotherhood further maintains that by virtue of the fact that the same employees were affected by an article 8 notice, it can be held that these employees had an effect on Mr. Evong's maintenance of basic rate protection.

The Company takes the position that Mr. Evong was never eligible for maintenance of basic rate protection and that incumbency payments were made erroneously to Mr. Evong in the past. The Company generally disagrees with the contentions of the Brotherhood.

FOR THE UNION: FOR THE Company:

(SGD.) T. N. Stol(SGD.) M. M. Boyle

National Vice-President, CBRT&GWfor: Assistant Vice-President, Labour Relations

There appeared on behalf of the Company:

O. Lavoie – System Labour Relations Officer, Montreal

W. Agnew – Regional Manager, Labour Relations, Moncton

And on behalf of the Union:

G. T. Murray– National Representative, Moncton

AWARD OF THE ARBITRATOR

The claim in the case at hand is for the amount of $1,523.32. The Union submits that that amount is payable to the grievor in the form of maintenance of earnings protection under article 8.9 of the Employment Security and Income Maintenance Agreement (ESIMA). It submits that the grievor is so entitled by reason of the dovetailing of four employees into the seniority list under collective agreement 5.62, by reason of a technological, operational or organizational change.

Implicit in the position advanced by the Union is that the grievor is entitled to the protection of article 8.9 of the ESIMA. It provides, in part, as follows:

"8.9 An employee whose rate of pay is reduced by $11.00 or more per week, by reason of being displaced due to a technological, operational or organizational change, will continue to be paid at the basic weekly or hourly rate applicable to the position permanently held at the time of the change providing that, in the exercise of seniority, he;

"(a) first accepts the highest-rated position at his location to which his seniority and qualifications entitle him; or

"(b) if no position is available at their location they accept the highest-rated position on his basic seniority territory to which his seniority and qualifications entitle him."

On a careful review of the material before me I am compelled to the conclusion that the above provisions were not intended to have application to an employee in the circumstances of Mr. Evong. It is common ground that at all material times Mr. Evong worked pursuant to what is characterized as a "hiring hall" arrangement, even though he was classified as belonging to a "core" group of employees, as distinguished from regular assigned and seasonal employees. It is agreed that Mr. Evong had access to work on an irregular basis, and that the amount of work available to him was dependent on a number of factors, including the amount of work coming through the port of Halifax, the amount of work claimed by employees senior to the grievor, and the grievor's own willingness to bid for such work as was available, on a day to day basis. Under those working conditions Mr. Evong was tantamount to a spare board employee with no guarantee of earnings and no strict obligations in respect of calling procedures or his own availability. His earnings could, and did, fluctuate widely, dependent on all of the factors described above.

On what basis could Mr. Evong therefore be said to fit within the contemplation of article 8.9 of the ESIMA? As is evident from the language of that provision, it intends to provide protections for an employee "... whose rate of pay is reduced by $11.00 or more per week" by reason of displacement. In the case at hand it cannot be said that Mr. Evong was displaced into a lower rate of pay by any technological, operational or organizational change. At most, his opportunities for work were reduced by the introduction into the seniority list of additional employees who were themselves the subject of an article 8 notice. When regard is had to all of the provisions of article 8 of the ESIMA, and in particular to the workings of article 8.9, the Arbitrator is compelled to conclude that the provisions of that article were not intended to apply in the circumstances which obtain in respect of Mr. Evong. Moreover, I am satisfied that certain prior payments made to the grievor, purporting to be in the nature of maintenance of earnings payments, were disbursed in error, as submitted by the Company's representatives. In the result, the Arbitrator can find no violation of the provisions of the collective agreement or of the the ESIMA, nor any basis upon which to order the payment of maintenance of basic rates protection to Mr. Evong, as claimed.

For the foregoing reasons the grievance must be dismissed.

17 March 1995 _____

MICHEL G. PICHER
ARBITRATOR