CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2720

Heard in Montreal, Wednesday, 10 April 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim for employment security benefits on behalf of various bargaining unit members possessing more than eight years of cumulative compensated service.

BROTHERHOOD'S STATEMENT OF ISSUE

As a result of the implementation, by the Company, of the so called "Basic Track Maintenance Force" (BTMF) program, some five hundred bargaining unit members lost their permanent positions with the Company. In addition, a significant number of employees who did not hold permanent positions at the time of the implementation of the BTMF also lost their jobs as this time. A large number of these (temporary) employees possessed more than eight years of cumulative compensated service. Notwithstanding this, the Company laid them off and refused to permit them any of the benefits of the employment security provisions of the Job Security Agreement. Because of this, the Brotherhood grieved.

The Brotherhood contends that, by taking the action it has, the Company violated Article 7, Article 8 and Appendix E of the Job Security Agreement, as well as any applicable provisions of the collective agreement.

The Brotherhood requests that all affected employees be permitted to avail themselves of their full entitlement pursuant to the Job Security Agreement and that they be compensated and made whole for any loss of any kind suffered as a result of this matter.

The Company denies the Company's contentions and declines its requests.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. T. Cooke	– Manager, Labour Relations, Montreal
G. D. Wilson	– Counsel, Montreal
S. J. Samosinski	– Director, Labour Relations, Montreal
D. V. Brazier	– Director, Labour Relations, St. Lawrence & Hudson Railway, Montreal
R. A. deMontignac	– Manager, Benefits and Deployment, Montreal
J. J. Favreau	– Manager, Track Maintenance, Toronto
R. J. Martel	– Labour Relations Officer, Toronto
D. E. Guerin	– Labour Relations Officer, Montreal
J. F. Boisvert	– Track Maintenance Specialist, Montreal

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
K. M. Deptuk	– Vice-President, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa
G. Beauregard	– General Chairman, Atlantic Region, Montreal
G. Kennedy	– Local Chairman, Lodge 229, Cranbrook

AWARD OF THE ARBITRATOR

In this grievance the Brotherhood asserts that the employment security provisions of the Job Security Agreement (JSA) are available to employees holding temporary positions who possess more than eight years of cumulative compensated service, to the extent that they have lost their employment by reason of a technological, operational or organizational change within the meaning of article 8 of the JSA. In its claim the Brotherhood relies on the decision of this Office in **CROA 2445**. In that case, which involved the Canadian National Railway and the Brotherhood of Maintenance of Way Employees (CN Lines East), it was found that employees of CN with eight years of cumulative compensated service holding temporary positions did enjoy the protections of employment security as provided under article 7 of the Employment Security and Income Maintenance Plan (ESIMP) there under consideration. The Brotherhood asserts that the instant case is indistinguishable, as the provisions of the JSA are virtually the same as those which were interpreted by this Office in **CROA 2445**.

The Company asserts a number of positions in response to the Brotherhood's grievance. Firstly, it submits that the Basic Track Maintenance Force program, which was an operational or organizational change, resulted only in the elimination of permanent positions within the bargaining unit. It maintains that the elimination of temporary positions, resulting in some twenty-three individual grievances which triggered the instant dispute, was solely the result of internal budgeting decisions and belt-tightening, which do not amount to an operational or organizational change, as that concept has been previously interpreted. In this regard the Company cites **CROA 316**.

Secondly, the Company objects to the Brotherhood's ultimate characterization of this grievance as being of a general policy nature, extending beyond the interests of the twenty-three employees whose original grievances gave rise the dispute. It submits that this matter should be viewed as relating only to the twenty-three grievances in question, and questions the ability of the Brotherhood to enlarge the scope of the findings and remedies sought, by reason of an adjustment in the Brotherhood's position late in the grievance and arbitration procedure. Finally, the Company submits that, in any event, the employment security protections found in article 7 of the JSA were never intended, as between the parties to this collective agreement, to cover employees holding temporary positions. It submits, on the basis of the language of the agreements in question, that the rights of temporary employees within its operations are clearly distinguishable from those negotiated separately between CN and the separate branch of the Brotherhood which represents employees of that company.

In light of the determination made on the merits of the issue of the scope of employment security protection, as elaborated below, it is unnecessary for the Arbitrator to deal with the issue of whether in fact the employees who are the subject of this grievance were adversely affected by an operational or organizational change, or whether the grievance can properly be treated as a policy grievance of general application. In approaching this matter, the Arbitrator appreciates the perception of the Brotherhood's representatives, based on the similarity of language as between the Employment Security and Income Maintenance Plan governing non-operating employees of CN and the language of the JSA which governs employees in the instant bargaining unit. It is true that in the railway industry in Canada there has been a history of collective bargaining which has yielded a strong measure of standardization as between the rights and obligations of employees of the major railways. By the same token, however, there are instances in which the separate rail carriers, and their local unions, have reached specific understandings and agreements which differ from those found in another railway, or a different part of the same railway, notwithstanding the general similarity of language which may be found in documents which form part of collective agreements, such as job security agreements. It is, therefore, very important for this Office to exercise a substantial degree of care in examining the evolution of such agreements and appreciating critical distinctions of agreement, understanding and application which may have emerged over the years. As is evident from the analysis of the instant JSA related below,

there are in fact substantial distinctions to be made between the job security agreement which governs the employees of the Brotherhood with CP Rail, as compared to the employees of the same Brotherhood in their relations with CN, insofar as the scope of employment security protections is concerned.

In **CROA 2445** the Brotherhood grieved on behalf of a CN employee who held a temporary Track Maintainer's position, claiming that he was entitled to employment security protection under the ESIMP, as he was negatively impacted by CN's Track Force Mechanization project. In coming to the conclusion that the grievance was well founded, this Office reasoned as follows:

> The following provisions of the Employment Security and Income Maintenance Plan are pertinent to the resolution of this grievance:
>
> > **7.1** Subject to the provisions of this Article, and in the application of Article 8.1 of The Plan, an employee will have Employment Security when he has completed 8 years of Cumulative Compensated Service with the Company. An employee on laid-off status on June 18, 1985 will not be entitled to Employment Security under the provisions of this Article until recalled to service.
> >
> > **7.2** An employee who has Employment Security under the provisions of this Article will not be subjected to layoff as the result of a change introduced through the application of Article 8.1 of The Plan.
> >
> > **7.3** An employee who has Employment Security under the provisions of this Article and who is affected by the notice of change issued pursuant to Article 8.1 of The Plan, will be required to exercise his maximum seniority right(s), e.g., location, area and region, in accordance with the terms of the collective agreement applicable to the employee who has Employment Security.
>
> Further, the definition provisions of the ESIMP are instructive. They read, in part, as follows:
>
> > **(a)** "Employment Security" means that an employee who has completed 8 years of Cumulative Compensated Service with the Company will have Employment Security as provided in Article 7.
>
> Article 37.1 of the collective agreement (Agreement 10.1) specifically refers to the entitlement of employees to the protections of the ESIMP. It provides as follows:
>
> > **37.1** The provisions of the Employment Security and Income Maintenance Plan dated April 21, 1989 will apply to employees covered by this Agreement
>
> The position of the Company is that the protections of employment security are intended to attach only to employees who hold permanent positions at the time of notice under article 8 of the ESIMP. The Arbitrator has considerable difficulty with that submission. The ESIMP is an elaborate agreement negotiated between parties sophisticated in the ways of collective bargaining. The text of the agreement itself reflects that some thought was given to the categories of employees who would be excluded from its protection. In this regard it is significant to note that article 11 specifically identifies and excludes casual and part-time employees from the provisions of the plan. It reads, in part, as follows:
>
> > **11.1** Casual and part time employees are those who work casually on an as-required basis from day to day, including those who work part days as distinguished from employees who work regular or regular seasonal positions.
> >
> > **11.2** Casual and part time employees are entirely excluded from the provisions of The Plan.
>
> Additionally, the agreement reflects the parties' understanding that seasonal employees, a classification which would include persons whose employment relationship would be more tenuous than that of many employees holding temporary positions, are covered by the terms of the ESIMP. In this regard, article 10 of the plan provides as follows:

> **10.1** Seasonal employees are defined as those who are employed regularly by the Company but who normally only work for the Company during certain seasons of the year. Articles 4 and 8 of The Plan shall apply to these employees except that payment may not be claimed by any seasonal employee during or in respect of any period or part of a period of layoff falling within the recognized seasonal layoff period for such group. In respect of seasonal employees laid off during working period, the seven and thirty-day waiting periods provided for in Articles 4.4(i)(b) and 4.4(i)(c) will apply, except that in the case of a seasonal employee who is not recalled to work at the commencement of the recognized seasonal working period, the seven or thirty-day waiting period, as the case may be, will begin on the commencement date of the recognized seasonal working period. Seasonal employees and recognized seasonal working periods shall be as defined in Memoranda of Agreement signed between the Company and the affected Organizations signatory thereto.

There is no language found in the ESIMP which would indicate any agreement of the parties to exclude employees holding temporary positions from its protection, where such employees have the requisite amount of cumulative compensated service. Further, as argued by counsel for the Brotherhood, the questions and answers appended to the ESIMP booklet, which are not themselves negotiated terms, but are intended to assist the employees in understanding how the agreement operates, support the view advanced by the Brotherhood. Question number 7 purports to answer the question "When can I not claim benefits?". Some twelve categories of circumstances are then listed, describing employees who are not entitled to benefits including, for example, persons who are on leaves of absence, employees held out of service for disciplinary reasons, seasonal employees during a recognized period of seasonal layoff, retirees and persons impacted by a reduction or stoppage of work due to a strike. Nowhere in the list, which by its nature appears to be exhaustive, is there any exemption of entitlement for employees holding temporary positions.

Question and answer numbers 62 and 63 read as follows:

> **#62** What happens if I cannot hold a position with the Company and I have Employment Security?
>
> You will continue to be paid the basic rate of your former position until such time that you can be placed on an unfilled vacancy.
>
> **#63** What is my former position?
>
> The last permanent or temporary position to which you were the successful applicant.

In the Arbitrator's view the above answers are compelling evidence that the Company had the same understanding as the Brotherhood, namely that temporary employees are covered by the employment security provisions of the Employment Security and Income Maintenance Plan.

The Company further suggests that past practice confirms its view that employees holding temporary positions were not intended to be protected by employment security. In this regard it stresses that the positions identified for abolishment in respect of article 8 notices under the ESIMP are, as a matter of general practice, permanent positions. In the Arbitrator's view that fact does not, of itself, sustain the position advanced by the employer. The positions which the Company chooses to abolish are within its discretion, having regard to the changes being implemented. That determination is not particularly instructive as to the understanding of the parties with respect to the protections to be afforded to employees in the event of displacements. Moreover, having regard to the fact that the concept of employment security has apparently existed between the parties for a relatively short number of years, having originated in 1985, this is not an issue which can be resolved by reference to long standing practice. I am satisfied that it is the terms of the collective agreement, and of the ESIMP, which must prevail in the circumstances of this case.

> The language of the ESIMP is barren of any indication that the parties intended that employees holding temporary positions and who have the requisite cumulative compensated service would not be entitled to the protection of employment security. The parties specifically excluded casual and part time employees from the protections of the plan, and separately addressed the entitlement of seasonal employees. In these circumstances, the more compelling conclusion is that by making no distinction as between employees who hold permanent or temporary positions, the parties to the ESIMP did not intend to exclude employees holding temporary positions who would otherwise be eligible.
>
> The above conclusion is further supportable on a purposive analysis. It is common ground that employees holding temporary positions may do so for extensive periods of the year, often exceeding the duration of the annual employment of seasonal employees, and in some cases being virtually continuous. On what basis can it be concluded that the parties would have intended to give the protections of employment security to seasonal employees, as provided in article 10 of the ESIMP, while depriving long service employees who hold temporary positions from the same protection? The Arbitrator can see none, and can see nothing in the language or overall scheme of the ESIMP to support the conclusion advanced by the Company. On the contrary, as evidenced by the questions and answers appended to the ESIMP, which were prepared by the Company, the evidence suggests emphatically that the parties did mutually intend the protections of employment security to extend to employees holding temporary positions who are negatively impacted by a technological, operational or organizational change which is the subject of a notice under article 8.1 of the Employment Security and Income Maintenance Plan.

There is, in the Arbitrator's view, an important and persuasive distinction which must be drawn between the temporary employees under consideration in **CROA 2445**, and those who are the subject of the instant grievance. As can been seen from the foregoing quotation from the award, this Office placed considerable weight on the fact that temporary employees were not specifically excluded from employment security by the terms of the ESIMP there under consideration, and that employment security protections were, in fact, extended to seasonal employees by the agreement of the parties. Central to that finding, however, is the agreement specifically reached between CN and the BMWE with respect to the employment security entitlement of seasonal employees, and in particular Extra Gang Labourers, under Agreement 10.13 between Canadian National Railway Company and the Brotherhood of Maintenance of Way Employees. Paragraph 6 of Appendix G of the ESIMP expressly provides that those employees are deemed to have a consolidated seniority date "... for employment security purposes and Mr. Larson's subsequent clarification of this issued on 8 June 1988." Clearly, given the language of Appendix G of the CN-BMWE ESIMP, notwithstanding the bare language of article 10.1 of the ESIMP, it was clearly established that the parties agreed to extend employment security protections to seasonal employees.

In the JSA which is the subject of this dispute, however, there is no such agreement. As can be seen, article 10.1 of the instant JSA reads identically to article 10.1 of the CN ESIMP. There is, however, nothing by way of addenda or otherwise, to arguably extend rights of employment security to seasonal employees. In the result, therefore, seasonal employees under the terms of the JSA do not have the benefit of article 7 of the JSA, which is the provision which governs employment security. Their rights are limited to article 4, generally governing layoff benefits and article 8, which governs periods of notice and the maintenance of basic rates.

In addition, as is evident from the award in **CROA 2445**, the Question and Answer segment of the ESIMP booklet contained what appears to be an acknowledgment that temporary employees would have employment security. In the instant case, although the Brotherhood seeks to rely on initial drafts of similar Question and Answer document, the parties were ultimately unable to agree on its inclusion within the terms of the JSA. In the result, the evidential underpinning of the questions and answers does not weigh heavily to support the Brotherhood's contention in the case at hand.

The Arbitrator is satisfied that, at a minimum, it can be said that there is an ambiguity in the language of the JSA as it pertains to the scope of employment security protection. Therefore, there is, in this circumstance, latitude to consider extrinsic evidence of the intention of the parties. In that regard the Company brings considerable evidence to bear. Firstly, the Company points to the historic origins of the concept of job security as it evolved between the parties. The first job security agreement became effective November 16, 1964, in a document which provided for

certain layoff benefits. This eventually developed into the more elaborate Job Security Agreement of January 29, 1969 which introduced required notice periods and the protection of Maintenance of Basic Rates (MBR) where the Company unilaterally initiates technological, operational or organizational change. At that time the introductory MBR articles read as follows:

> In addition to all other benefits contained in this Agreement which are applicable to all Eligible Employees, the additional benefits specified in Article 8.9 are available to employees who are materially and adversely affected by Technological, Operational or Organizational changes instituted by the Company.
>
> An employee whose rate of pay is reduced by $2.00 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. ...[emphasis added]

As can be seen from the foregoing, in its initial conception, the notion of protection of employees in the event of technological, operational or organizational change was intended for employees holding permanent positions.

There is ample evidence to support the Company's submission that that intention never changed, insofar as the scope of entitlement to employment security protection is concerned, with the advent of that concept in 1985. It is then that the following language of article 7 of the Job Security Agreement was negotiated:

> **7.1** Except as provided in Article 7A, subject to the provisions of this Article and in the application of Article 8.1 of this Agreement, an employee will have Employment Security when he has completed 8 years of Cumulative Compensated Service with the Company.
>
> An Employee on laid-off status on the applicable following dates will not be entitled to Employment Security under the provisions of this Agreement until recalled to service.

LAID-OFF STATUS DATE	**FOR EMPLOYEES REPRESENTED BY THE**
9 July, 1985	TCU, BMWE, CSC System Council No. 11 of the IBEW
22 August 1985	CPPA
11 September 1985	RCTC
14 March 1986	IAM, IBEW, UAJAPP, SMWIA, IBF&O, IBB&B

> **7.2** An employee who has Employment Security under the provisions of this Article will not be subjected to lay-off or continuing lay-off as the result of a change introduced through the application of Article 8.1 of the Job Security Agreement.

The Company advances the evidence of Mr. Don Brazier, formerly Assistant Vice-President, Industrial Relations, who was present at the negotiation of the 1985 version of the Job Security Agreement, to the effect that employment security coverage for seasonal or temporary employees was never intended by the parties. To the same effect it tenders the evidence of Mr. Steve Samosinski, Director of Labour Relations, who has also been part of all main table bargaining in relation to this issue, as well as others. He asserts that there was never any attempt by the non-operating unions, including the instant union, to negotiate a provision which would extend the coverage of employment security to employees who hold temporary or seasonal positions. The evidence further establishes that for some ten years since the inception of employment security, all presentations to employees by officers of the Company have, without grievance or complaint, consistently stated that only employees holding permanent positions can be deemed adversely affected by a technological, operational or organizational change as contemplated by article 8 of the JSA, so as to be entitled to employment security benefits.

Finally, the Company brings to the Arbitrator's attention the evidence of the interpretation of article 7 of the JSA which has been accepted by other co-signatories of the Job Security Agreement, including the Transportation

Communications Union, the International Brotherhood of Electrical Workers (S&C), the Rail Canada Traffic Controllers and the CAW Shopcraft Unions. With the renegotiation of the collective agreement in 1995 the Company wished to put to rest any doubt about the exclusion of employees holding temporary positions from employment security protections. In the result, on March 12, 1995 it entered into a memorandum of settlement with three of the unions, the TCU, IBEW(S&C) and RCTC, which included a letter which reads as follows:

> In negotiating changes to the Job Security Agreement, concerns were raised by the Unions in regard to the insertion of the work "permanent" in article 1.1(a), as well as a new provision dealing with non-T.O.&O. changes.
>
> Specifically, the Unions expressed concerns that these wording changes may have an impact on the type of notices that may be served in the future. In this regard, it was stated that the Company's intention was simply to clarify the intent and historical understanding of the parties. The type of notice would continue to be based on past practice and arbitral jurisprudence.
>
> Yours truly,
>
> (signed) S.J. Samosinski
> Director, Labour Relations

As a result, article 1.1(a) (formerly article 8.1) of the Company's Job Security Agreement with those unions now reads as follows:

> **1.1 (a)** The Company will not put into effect any Technological, Operational or Organizational change of a permanent nature which will have adverse effects on employees holding **permanent** positions. [emphasis added]

It is, of course, evident that the Brotherhood which files this grievance did not agree to the changes accepted by the other unions which shared in the evolution of the Job Security Agreement and employment security protections. Be that as it may, the Arbitrator cannot ignore the portent of the evidence advanced by the Company which, on the balance of probabilities, does confirm that the several unions who were party to the Job Security Agreement for Non-Operating and Shopcraft Employees appear to accept, as the Company asserts, that from 1985 onwards the protections of employment security have not been available, within this Company, to employees holding temporary or seasonal positions. As noted above, that understanding and practice is radically different from what was found in the case of the agreements between CN and the BMWE.

When all of the foregoing factors are examined, the Arbitrator is compelled to the conclusion that, insofar as temporary employees within the instant bargaining unit are concerned, the parties never intended to confer upon them the extraordinary protections of employment security. In that regard, temporary employees are treated no differently than seasonal employees. That is confirmed in the history of article 7 of the JSA, in its consistent application, without objection, over a period of ten years by the Company and in the clear understanding reflected in documents recently agreed to by other unions signatory to the original JSA.

It would, in the Arbitrator's view, be unfair to suggest that the instant grievance is motivated by mere opportunism. As the Brotherhood's representatives assert, there is a legitimate labour relations concern for the treatment of "temporary" employees who, in fact, may have held positions, without interruption, for a substantial period of years under the terms of the collective agreement, even though such positions may not have been designated "permanent" by the Company. In this regard it is noteworthy that the Company itself has voluntarily extended to a number of such temporary positions the deemed status of permanent position, so as to allow certain incumbents to have access to employment security protection. In the Arbitrator's view the status of the individuals for the purposes of the JSA is a separate matter, of obvious substance, which should be addressed between the parties themselves. Moreover, the instant award is clearly rendered without prejudice to the right of the Brotherhood, or any employee within the bargaining unit, to grieve his or her status as a temporary employee, for the purposes of the application of the JSA. Such grievances, if timely, must obviously be determined on their own merits, absent the negotiation of an agreed general formula by the parties themselves.

For the reasons related, the Arbitrator is compelled to the conclusion that the position advanced by the Company must be sustained. Having regard to the history of article 7 of the JSA, to the limited rights of seasonal employees under its terms, and to the extrinsic evidence as to the understanding which governed the application and

interpretation of article 7 since 1985 among several signatory unions, as further confirmed by the recent letter of clarification agreed to by them, the Arbitrator is satisfied, on the balance of probabilities, that the parties at hand did not intend that employment security should be available to employees holding temporary positions.

The grievance is therefore dismissed.

May 7, 1996

(signed) MICHEL G. PICHER
ARBITRATOR