# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2801

Heard in Montreal, Tuesday, 10 December 1996

concerning

## CANADIAN PACIFIC LIMITED

and

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

### DISPUTE:

The application of the $25,000.00 lump sum relocation amount as per article 6.2(b) of the Job Security Agreement.

### JOINT STATEMENT OF ISSUE:

On August 22, 1996, the Company advised the Union that the $25,000.00 lump sum relocation amount would be provided only to an employee with employment security who sold his home in his former location and/or purchased another home at his new location.

The Union contends that the Company's interpretation of article 6.2(b) is incorrect, and that an employee who qualifies for relocation benefits under article 6, fulfilling one of the requirements of 6.1 and the requirements of article 6.2 and who is affected by an article 8 notice and has employment security,, may elect in lieu of the relocation benefits provided elsewhere in article 6, a lump sum payment of $25,000.00, more particularly such employee need not sell his current home nor purchase a home in the new location in order to be entitled to the lump sum payment of $25,000.00.

The Union requests that the Company formally recognize the Brotherhood's position in this dispute and that any employee affected by the Company's interpretation be compensated accordingly.

The Company denies the Union's contention and declines the Union's request.

| FOR THE BROTHERHOOD: | FOR THE COMPANY: |
|---|---|
| (SGD.) J. J. KRUK | (SGD.) D. T. COOKE |
| SYSTEM FEDERATION GENERAL CHAIRMAN | MANAGER, LABOUR RELATIONS |

There appeared on behalf of the Company:

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| D. T. Cooke | – Manager, Labour Relations, Calgary |

And on behalf of the Brotherhood:

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| P. Davidson | – Counsel, Ottawa |
| J. J. Kruk | – System Federation General Chairman, Ottawa |
| G. D. Housch | – Vice-President, Ottawa |
| D. W. Brown | – Sr. Counsel, Ottawa |

# AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the Company and the Brotherhood signed a new Job Security Agreement which became effective June 1, 1995, save for the provision, governing relocation expenses, which became effective August 1, 1995. The parties are disagreed as to the entitlement of employees to a lump sum payment provided for within article 6 of the Job Security Agreement. Article 6 provides, in part, as follows:

> **6.1** To be eligible for relocation expenses an employee:
>
> **(a)** must have been laid-off or displaced, under conditions where such lay-off or displacement is likely to be of a permanent nature, with the result that no work is available at his home location and, in order to hold other work on the Railway, such employee is required to relocate; or
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> **(b)** must be engaged in work which has been transferred to a new location and employee moves at the insistence of the Company; or
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> **(c)** must be affected by a notice which has been issued under article 8 of this agreement and he chooses to relocate as a result of receiving an appointment on a bulletined permanent vacancy which at the time is not subject to notice of abolishment under article 8 of this agreement and such relocation takes place in advance of the date of the change, provided this will not result in additional moves being made; or
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> **(d)** must have employment security and be required to relocate to have work under the provisions of article 7 of this Agreement.
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> **6.2 (a)** In addition to fulfilling at least one of the conditions set forth above, the employee:
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> **(i)** must have two years' cumulative compensated service; and
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> **(ii)** must be a householder, i.e., one who owns or occupies unfurnished living accommodation. This requirement does not apply to articles 6.5, 6.6, 6.7 and 6.10; and
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> **(iii)** must establish that it is impractical for him to commute daily to the new location by means other than privately-owned automobile;
>
> **(iv)** must be required to travel an additional 25 miles from his residence to his new location.
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> **6.2 (b)** Effective August 1, 1995, an employee who qualifies for relocation benefits under this article as per above and who is affected by an article 8 notice and has employment security, may elect in lieu of the relocation benefits provided elsewhere in this article, a lump sum payment as follows:

| | **WITHIN THE REGION** | **ON THE SYSTEM** |
|---|---|---|
| For a Homeowner | $25,000.00 | $50,000.00 |
| For a Renter | $14,000.00 | $29,000.00 |

The parties are disagreed as to the entitlement of employees to the alternative of a lump sum payment of $25,000.00 for persons who own their own homes and are required to relocate within the region. The position of the Company is that the allowance therein provided is payable only if the employee sells his or her home and relocates their household to either owned or rented accommodation in the new location. The Brotherhood, on the other hand, maintains that there is no requirement that a homeowner necessarily sell their original home, or move their household, even to rented premises, to qualify for the payment. The Brotherhood relies on what is says is the plain wording of articles 6.1 and 6.2, stressing that the $25,000.00 lump sum payment is a new provision in the Job Security Agreement. Its representative submits that the amount in question fairly compensates the homeowner who, for example, decides to retain his or her house in the original location, possibly renting it or simply retaining it, and thereby incurring certain liabilities which are compensated for by the payment of the lump sum allowance. The Brotherhood argues that there is, very simply, no language within the provisions of article 6 which would support the Company's position that

an employee receives the lump sum allowance for a homeowner only if he or she sells a principal residence as a result of being required to relocate their household.

The Brotherhood argues that there is a purposive underpinning to its interpretation, as reflected in the language of article 6. It notes, specifically, that article 6.10(a) provides a monthly relocation allowance of $190.00, for a maximum of twelve months, for an employee "who is eligible for moving expenses [and] does not wish to move his household to his new location". Counsel for the Brotherhood submits that article 6 expressly contemplates, therefore, the circumstance of an employee who elects to maintain his principal household in the original location even though he or she does relocate, perhaps by finding rental or rooming accommodation, to work at the new location. He argues that the language of article 6.2(b) of the JSA, read in tandem with provisions such as article 6.10(a), supports the view that the agreement does contemplate the payment of the lump sum amount of $25,000.00 for a homeowner in lieu of relocation benefits such as the allowance provided under article 6.10(a).

The Company relies on the genesis of the lump sum payment formula. Its representative notes that, historically, relocation benefits under article 6 of the Job Security Agreement were intended to cover the cost of moving household goods, incidental expenses, reasonable transportation expenses, meal and temporary accommodation allowance and time off with pay to seek accommodation in the new location. Significantly, he notes, the prior versions of article 6 provided for "reimbursement of up to $11,000.00 for loss sustained on the sale of a relocating employee's private home which he occupied as a year round residence." The Company argues that the provision in question was intended to compensate employees for the difference between the established fair market value and ultimate sale price of their homes, as well as agents' fees, legal fees, mortgage penalties and other incidental costs incurred in the sale and purchase of a home. Specifically, article 6.8(a) of the former Job Security Agreement, which covered not only the instant Union, but eight other non-operating employee unions, provided as follows:

> **6.8 (a)** Except as otherwise provided in article 6.8(c), reimbursement of up to $11,000.00 for loss sustained on the sale of a relocating employee's private home which he occupied as a year-round residence. Loss sustained is determined as the difference between the value determined at the outset plus any real estate agent fees, legal fees, including those legal fees on purchase of a home at the new location, and any mortgage closure penalties, and the amount established as the selling price in the deed of sale.

It should be noted that the current Job Security Agreement contains a provision similar to the former version of 6.8(a), save that the limit of reimbursement is now $12,000.00 on the loss incurred on the sale of an employee's private home.

Beginning in 1993, the Company made agreements with certain unions in the negotiation of special agreements involving employees being required to relocate. In part, it submits, to reduce the administrative burden of processing relocation expenses, including relatively complex evaluation analyses, the Company agreed, on August 28, 1993, to the terms of a special agreement with the Transportation Communications Union in relation to the move of employees to new facilities in Winnipeg and Montreal, including the option of a $25,000.00 lump sum payment, in lieu of relocation benefits. Specifically the language of that special agreement provided, in part, as follows:

> **8.3** An employee required to relocate within his Region and qualified for the relocation benefits under article 6 of the Job Security Agreement may in lieu choose a lump sum relocation payment as follows:
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> $25,000.00 if the employee is a householder
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> $14,000.00 of the employee leases a dwelling.

The Company further notes that a similar agreement was struck with the CAW with respect to a special agreement related to the restructuring of the mechanical function on Heavy-Haul Canada in October of 1993, and that similar agreements were reached with other unions throughout 1994, consistently incorporating the twin lump sum payment options of $25,000.00 for a home owner and $14,000.00 for a renter. The Company's representative stresses that the $11,000.00 difference between the two allowances was based on what was perceived as the average loss typically sustained on the sale of an employee's home, based on the experience of the Company and its employees in the administration of article 6.8(a) of the Job Security Agreement.

During the course of national negotiations for the renewal of the agreements of a number of non-operating unions the Company signed a memorandum of agreement with three of the unions, the TCU, the IBEW S&C and the RCTC. Article 3.6 of that agreement provided, in part, as follows:

> Employees required to relocate, that is, when an employee must travel an additional 25 miles from his residence to his new work location, pursuant to article 3 and who actually relocates, will be entitled to the relocation benefits pursuant to article 6 or, in lieu, may choose a lump sum relocation benefit as follows:
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> - within the Region … $25,000.00 / 14,000.00

Sometime later, on May 5, 1995 during the course of the mediation conducted under the auspices of the Adams Mediation–Arbitration Commission, the parties to the instant grievance signed a memorandum of agreement which included the following:

> A lump sum relocation option in lieu of the relocation benefits provided in article 6 of the Job Security Agreement provided an employee actually relocates as follows:
>
> - ON THE REGION
>
>  $25,000.00 for a home owner
>
>  $14,000.00 for a renter

The above provision eventually became incorporated into the Job Security Agreement with the Brotherhood, in the present terms of article 6.2(b)

In further support of its interpretation, the Company filed in evidence letters of clarification registered with both the CAW and the IBEW, confirming its interpretation of the payment of the $25,000.00 lump sum. For example, a letter dated October 3, 1996 addressed to Mr. A.G. Cunningham, Senior System General Chairman of System Council No. 11 of the IBEW , reads as follows:

> This refers to your request for clarification regarding the lump sum relocation benefit provision of the Income Security Agreement.
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> To be entitled to any lump sum relocation benefit, an employee must have eight or more years of CCS, and must be adversely affected by a TO&O change.
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> As long as there is a transaction either at the former location or at the new location (transaction meaning sale or purchase), the $25,000 lump sum is available to a current home owner.
>
> A current home owner who chooses not to sell his current residence and declares that he will be renting in his new location is entitled to a $14,000 lump sum. The employee must show proof of a lease/contract at the new location.
>
> A current home owner may put his house on the market and elect to rent a residence in the new location. In such circumstances, the Company will advance $14,000 upon presentation of a lease/contract at the new location with the $11,000 balance to follow upon sale of residence at the former location.

The Brotherhood's representatives reply that they were not privy, nor did they agree to, the concept of the lump sum payment as it may have been negotiated with other unions, either through special agreements or the renewal of their respective collective agreements, at separate bargaining tables. Its representative submits that there was no rationale expressed to the Brotherhood's negotiators by the Company with respect to the proposed lump sum payments, nor any indication during the course of bargaining that a home owner must necessarily sell his or her original home on the occasion of a relocation as a condition of receiving the lump sum payment. The Brotherhood's National Vice-President is emphatic that during the course of negotiations there was no such clarification or qualification. He relates that the Brotherhood's own perception was that payment of the greater lump sum amount to a home owner is simply in recognition of the fact that, apart from the cost of selling a home, the individual who retains ownership of a home at a prior location of work incurs certain liabilities in doing so, a matter which is entirely

different from the specific risks of selling a home, dealt with under the provisions of article 6.8(a) of the Job Security Agreement.

Upon a close examination of the submissions of the parties, it is apparent to the Arbitrator that the intention of the Employer and the intention of the Brotherhood were not the same when the language of article 6.2(b) of the Job Security Agreement was agreed to. I have little doubt that the Company believed that it was simply transferring into the Job Security Agreement of the Brotherhood of Maintenance of Way Employees the same lump sum option for employees who sell their homes as it had previously arranged with other non-operating unions. It appears clear, however, that it made no representation and tabled no contract language which would have indicated to the Brotherhood, which insisted on separately negotiating its own Job Security Agreement, that its intention was to merely adopt the language and intention of agreements with other unions.

In the Arbitrator's view the situation at hand is to be distinguished from the facts reviewed in **CROA 2720**. In that case the Arbitrator noted that the specific understanding reached with a number of non-operating unions, which had shared the same Job Security Agreement with this union from 1985 onwards, was relevant to an understanding of the intention of the provisions in question. In that case where the Brotherhood and other unions shared common language over a substantial period of time, with respect to the terms of the Job Security Agreement, it could not compellingly argue a different intention or meaning in the separate agreement subsequently negotiated with the Company, where there was no material change in the language in dispute.

The case at hand is substantially different. As noted above, there is no prior history of lump sum payments in lieu being available to employees of the Brotherhood's bargaining unit, as an alternative to relocation expenses, as is now provided in article 6.2(b). This is, in other words, a new provision in respect of which the Arbitrator can give no weight to the agreements and understandings reached with other unions at separate bargaining tables.

In the result, the intention of the document, as the parties did not have a common intention, must be gleaned from the language of the original memorandum of understanding, and the terms of article 6.2(b) as they now appear in the Job Security Agreement. Firstly, the Arbitrator is impressed with the somewhat greater clarity of the language of the memorandum of agreement of May 5, 1995. That agreement, which I am satisfied can be looked to as guidance to understand the provisions of article 6.2(b), specifically states that in order to qualify for the lump sum payment in lieu, an employee must actually relocate. It is a generally accepted principle of arbitral law that parties to a collective agreement are generally taken to negotiate the terms of their agreement against the background of prior published arbitral decisions. A prior decision of this Office, **CROA 1977**, dealt with the Job Security Agreement between the Brotherhood and the Canadian National Railway Company. In that case the parties were disagreed as to the meaning of the term "relocate" in article 7.7 of the Employment Security and Income Maintenance Plan (ESIMP) there under consideration. The Arbitrator rejected the argument of the Brotherhood that relocation meant simply the movement of a employee's job location from one place to another, independent of the location of his or her household. In this regard the following reasoning appears in the award:

> Article 6 of The Plan deals broadly with "relocation expenses" and covers such benefits as moving expenses, allowances for incidental expenses, transportation expenses for travel from an employee's former location to his new location and, among other things, leave to seek accommodation in the new location. There are, moreover, provisions for loss on the sale of an employee's home and for the moving of a mobile home residence. The entire scheme and thrust of the article, read in conjunction with Article 7, addresses the circumstances of an employee who is required to relocate in the sense of changing his principal place of residence. An employee who elects to keep his original place of residence may nevertheless work in another location and receive, pursuant to Article 6.10 of The Plan, a monthly cash allowance, payable for a maximum of twelve months. In the Arbitrator's view a person in that circumstance is not one who can, by a fair construction of the words of The Plan, be deemed to have "been required to relocate" within the meaning of Article 7.7.

In the following paragraph this Office then concluded: "The term 'relocate' within Article 7.7 of the ESIMP refers to the relocation of an employee's principal residence."

I am satisfied that the parties negotiated the provisions of their memorandum of agreement of May 5, 1995, and in particular the phrase "provided an employee actually relocates" in the knowledge of the above award, and with the

intention of incorporating it into their agreement. In the result, I cannot accept the partial argument advanced by the Brotherhood, to the effect that a homeowner employee can claim the lump sum of $25,000.00 in lieu of other relocation benefits merely by virtue of his or her transfer of work to another location. Clearly, the employee in question must move his or her household, changing their permanent place of residence, to qualify for the allowance. That, of itself, does not mean that they must necessarily sell a home which they may have owned in the prior location of work. When regard is had to the language of the memorandum of agreement, against the background of **CROA 1977**, an employee who owns a house can move his or her household or family, taking up principal residence in the new location of work in rented accommodation. Such an individual would, in my view, qualify as an employee who "actually relocates", notwithstanding that he or she may retain ownership of a house in a prior location.

In the final analysis, there is no language to be found in the Job Security Agreement, or necessarily to be implied from its terms, which would support the interpretation advanced by the Company. While its own intention may well have been to conclude an agreement which gave to this Union no more than was negotiated with other non-operating unions, it must show more than its privately held and unexpressed intention or understanding to support the conclusion that the contract which it in fact made reflects the same intention. There is no language in the agreement, nor were there any representations made at the bargaining table or expressed through prior practice between the parties from which this Office can conclude that the memorandum of agreement of May 5, 1995 or the terms of article 6.2(b) of the JSA, as incorporated on October 12, 1995, can be said to support the Company's interpretation.

As Counsel for the Brotherhood stresses, the language of article 6.2(b) is simple and straightforward. On its face, a homeowner who qualifies for relocation benefits "as per above", meaning the qualifications described in article 6.2(a), can assert an unqualified right to the payment of the lump sum in lieu of relocation benefits, provided that the employee actually relocates. Plainly, if the Company wished these provisions to have a more restrictive application, it was incumbent upon it to insist upon language which would make it clear that the lump sum payment for a homeowner, which now appears for the first time in the parties' Job Security Agreement, is payable only in the event that the sale or purchase of a home occurs. In the absence of any such language, however, the Arbitrator is compelled to sustain the interpretation advanced by the Brotherhood.

For the foregoing reasons the grievance must be allowed. The Arbitrator declares that the interpretation of article 6.2(b) advanced by the Brotherhood is correct, and directs that the Company compensate any employee adversely affected by its prior failure to so interpret the provision.

December 19, 1996

**(signed) MICHEL G. PICHER**
**ARBITRATOR**