CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2802

Heard in Montreal, Tuesday, 10 December 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Grievance concerning the relocation (i.e. Larson) protection of all affected employees falling within the scope of agreement 10.1 and supplemental agreements 10.3, 10.8 and 10.9, including but not limited to the following specifically named employees: Messrs. D. Berthold, T. Seary, D. Moore, E. Galea, D. Poeppel, R. Musgrove, L. Davidson and R. Petlack.

JOINT STATEMENT OF ISSUE:

On August 19, 1996, the Brotherhood initiated a grievance as a result of a dispute that had arisen between the parties. The source of this dispute is the Company's position that, as a result of the Award of Justice George Adams dated June 14, 1995, all employees as of that date lost their relocation protection and were, thereby, no longer protected from being displaced in future Article VIII situations. The Brotherhood took the position that the Adams' award did not have the effect of automatically removing the relocation protection of employees who were relocation protected on June 14, 1995.

The Brotherhood contends that: **1.)** The intent of the Adams' award was not to deny the right of employees who were relocation protected on June 14, 1995, to continue to be relocation protected for the remainder of the five-year period stipulated for in the preceding Employment Security and Income Maintenance Agreement (ESIMP); **2.)** The Company's position is in violation of article 7.11 of the current ESIMP and article 7.7 of the preceding ESIMP; **3.)** The Company has dealt unfairly with the employees involved in violation of article 18.6 of agreement 10.1.

The Brotherhood requests: the Arbitrator: **1.)** to declare that the Brotherhood's interpretation of the Adams' award, i.e., that employees who were relocation protected on June 14, 1995, shall continue to be relocation protected until the expiration of their five-year term is correct; **2.)** and to order that all affected employees be compensated for all wages and benefits lost and expenses incurred as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) R. F. LIBERTY
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

S. Michaud	– Manager, Labour Relations, Montreal
N. Dionne	– Manager, Labour Relations, Montreal
J. Dixon	– Assistant Manager, Labour Relations, Edmonton
J. Little	– Coordinator, Engineering, Specila Projects, Montreal

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
R. F. Liberty	– System Federation General Chairman, Winnipeg

K. Deptuk – Vice-President, Ottawa
G. D. Housch – Vice-President, Ottawa
P. Davidson – Counsel, Ottawa

AWARD OF THE ARBITRATOR

As a first matter, it appears undisputed that employees who are subject to Supplemental Agreements 10.8 and 10.9 have, by the parties' own written agreement, been provided with a continuation of Larson protection, for the remainder of their existing protection period. That is plainly reflected in a letter of agreement made between the parties, dated April 2, 1995. It specifically provides, in part, as follows:

> Employees presently protected under article 7.7 of the Employment Security and Income Maintenance Agreement (The Plan) dated April 21, 1989 will continue to be protected for the remainder of their protection period.

The issue of substance which remains to be resolved is whether employees other than those with pre-existing Larson protection under Supplemental Agreements 10.8 and 10.9 are also to be given such protection, in light of the award of the Mediation-Arbitration Commission chaired by Mr. Justice Adams, dated June 14, 1995. The Brotherhood bases its claim that such employees are protected, in part, on the language of article 7.11 of the post-Adams award CN-BMWE agreement on employment security which reads, in part, as follows:

> Employees on employment security status and receiving employment security benefits as of June 13, 1995, and governed by the terms and conditions of article 7 of the ESIMA of April 21, 1989, ("the Former Plan") as amended, will continue to be governed by those provisions subject to the following additional conditions or limitations which will come into effect on October 13, 1995.

The Arbitrator has some difficulty with the position advanced by the Brotherhood. A review of the award of the Mediation-Arbitration Commission reflects that it adverted fully to the problems experienced by the Company with respect to the mobility of its work force, and how the limitations on that mobility through restrictive relocation requirements had a substantial cost impact. At page 56 of its award the Commission speaks specifically of the employer's concern at being required to hire new employees in certain regions while other regions had employees remaining on employment security status. On the following page it notes the Company's reliance on settlements reached with unions in CP Rail, as well as between itself and the IBEW and the RCTC, noting that obligations to relocate under those agreements have been expanded to the system level.

In approaching the award of the Commission, it is also important to note that the Commission was fully cognizant of the limitations imposed upon the Company by Larson protection. The details of Larson protection are specifically reviewed by the Commission at page 44 of its award. When the report is read as a whole, it appears to the Arbitrator that the Commission considered itself seized of the issue of costs occasioned to the Company by reason of restrictive relocation provisions in the pre-existing employment security system, including Larson protection. In the first paragraph of its decision, at p. 59, the Commission specifically states: "With the future so uncertain for CN and CP, the certain unlimited cost associated with ES and the hiring of fresh employees while paying for this excess staff have become intolerable." In the result, the theme of greater efficiency, in part through the increased mobility of employees with the benefit of employment security protection, is well articulated in the award.

A second theme is the harmonizing of employment security plans as among the various trade unions. At p. 61 the Commission comments, "Nevertheless, ES will continue to burden these parties until it is resolved in a manner bearing some relationship to the agreements CP and CN have negotiated with several other trade unions." It is in that context that the Commission proceeds to make its award in respect of the terms of the employment security agreement to bind these parties.

Significantly, at p. 62 of its award the Commission provides, in part, as follows:

- Employee obligations in order to remain eligible for ES shall be as set out in the CN and RCTC Agreement, but permanent vacancy for the purposes of relocation on the system shall mean a job of 6 months duration or longer.
- Rights and obligations of employees currently on ES shall be as set out in the CN and RCTC Agreement with the exception that there will be a four-month delay in the application of these new rights and obligations, and on the explicit understanding that these employees are entitled to a full 6-year benefit, regardless of the period of time they have already been in receipt of ES.

...

- All side letters as proposed by CN and as provided for in the CN and RCTC Agreement including 2-year restraint on subsequent relocation.

It is common ground that the CN-RCTC agreement no longer contains Larson protection. Therefore, eligibility for employment security under that agreement, in the sense contemplated by the first paragraph quoted above, contemplates that the obligation of employees to displace is no longer to be qualified by the continued application of Larson protection. Further, it is not insignificant, in the Arbitrator's view, that the Commission did not adopt the specific language negotiated by the parties themselves, in the letter of April 27, 1995 to establish continued Larson protection for employees who, at the time of the award, were under the Larson protection of article 7.7 of the prior Employment Security and Income Maintenance Agreement. As the parties seem to appreciate, the grandparenting of such rights must normally be accomplished through the formulation of clear and unequivocal language. There is language comparable to the April 17, 1995 agreement to be found in the Adams Award.

Further, the Arbitrator is not impressed with the suggestion that article 7.11 of the CN-RCTC agreement, which provides that "employees on employment security benefits as of May 31, 1995, and governed by the terms and conditions of article 7 of the ESIMA of April 21, 1989, ("the Former Plan") as amended, will continue to be governed by those provisions subject to the following additional conditions or limitations which will come into effect on October 01, 1995" operates to extend Larson protection for those who had it at the time of the Commission's award. There are obviously many forms of benefits under the rather complex terms of the ESIMA. I am not persuaded, however, that Larson protection is, in the sense contemplated by the language of the above provision, a "benefit". Rather, like seniority or cumulative compensated service, it is a status which employees could invoke for their protection. Moreover, as appears from the remainder of the language in the CN-RCTC agreement, it would appear that the additional conditions which override the terms of the former plan include the specific obligation to protect permanent vacancies on a system basis, as administered by the Labour Adjustment Committee. Specifically, the CN-RCTC agreement provides that if the Labour Adjustment Committee cannot fill a vacancy on the system, it must be filled by the junior employee on the Region. That provision appears to the Arbitrator as intended to operate notwithstanding any prior Larson protection.

Finally, I find it difficult to rationalize the third paragraph quoted above from the Commission's award, with the continuation of Larson protection on a more local basis. It would appear that the Adams Commission adverted to the burden of employees being required to relocate, resolved that there must nevertheless be an obligation to relocate more broadly on a system basis, and provided that the Company not be able to require an individual to relocate twice on the system scale within a two year restraining period. That is the limit on relocation restraint to be found in the award.

Most fundamentally, it appears clear that the intention of the Commission is that, as reflected in the first quoted paragraph, employee obligations, including obligations of relocation as a condition to remain eligible for employment security for the members of the Brotherhood's bargaining unit, are to be the same as those negotiated between the Company and the RCTC. As related above, that agreement contains no Larson protection, nor any grandparenting of employees with such protection.

In the result, with the exception of employees falling under Supplemental Agreements 10.8 and 10.9, discussed above, the claim for continued Larson protection asserted by the Brotherhood cannot succeed. Specifically, the Arbitrator finds and declares that the intent of the Adams award was not to provide continued relocation protection for employees who had such protection on June 14, 1995. By the parties' own agreement, an exception was made for employees covered by the agreement of April 27, 1995 who fall under Supplemental Agreements 10.8 and 10.9 In these circumstances, assuming it is arbitrable, there is no basis to the assertion that the Company has dealt unfairly with the employees involved or that there has been a violation of article 18.6 of Agreement 10.1, or any provision of the Employment Security and Income Maintenance Agreement.

The grievance is therefore dismissed.

December 19, 1996

(signed) MICHEL G. PICHER
ARBITRATOR