CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2841

Heard in Montreal, Thursday, 13 March 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim on behalf of Mr. Richard Fisher.

JOINT STATEMENT OF ISSUE:

At the beginning of November 1996, the grievor was on employment security status. On November 4, 1996, the Company issued Bulletin No. SD-11 that advertised a temporary Track Maintainer's position with headquarters in Sudbury, Ontario. Although the grievor did not bid this Track Maintainer's position, he was appointed to it by the Company on the Award Bulletin dated November 21, 1996.

The Union contends that: **1.)** By requiring the grievor to take the Track Maintainer's position in question, the Company violated Articles 7.3(d) and 7.9 of the Job Security Agreement and Sections 14.1, 14.12 and 14.14 of Agreement No. 41; **2.)** The Company also violated Item 1 of the Letter of Agreement concerning the sale/lease of the Ottawa Valley Line entered into between the Company and the Brotherhood dated October 30, 1996.

The Union requests that: A corrector award be issued awarding the position in question to the senior applicant, Mr. D. Miller, and that the grievor be compensated for all expenses incurred as a result of this matter.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. KRUK	(SGD.) D. T. COOKE
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: DISTRICT MANAGER, ENGINEERING SERVICES

There appeared on behalf of the Company:

D. T. Cooke	– Manager, Labour Relations, Calgary
S. J. Samosinski	– Director, Labour Relations, Calgary
J. C. Presley	– District Manager, Engineering Services, Sudbury

And on behalf of the Brotherhood:

D. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa
K. M. Deptuck	– Vice-President, Ottawa
M. Couture	– General Chairman, Eastern Region, London

AWARD OF THE ARBITRATOR

The grievor, Leading Track Maintainer Richard Fisher, was impacted by an operational change implemented on October 28, 1996, involving the lease of the Company's Ottawa Valley territory to another railway company. Headquartered at North Bay, Ontario, and having the protection of employment security under the Job Security Agreement, and the benefit of the terms of special agreements reached with respect to the transfer of the Ottawa Valley lines to Trans-Ontario Railway, the grievor was eventually required by the Company to fill a temporary track maintainer's position at Sudbury, Ontario on November 21, 1996. The Brotherhood submits that the obligation imposed upon Mr. Fisher is inconsistent with the letter and spirit of the Job Security Agreement, including the "eight on eight" provision found within it, as well as a letter of understanding dated October 30, 1996 concerning the lease of the Ottawa Valley lines, as well as the job bulletin procedures found within section 14 of the collective agreement. In particular, the Brotherhood cites article 7.9 of the Job Security Agreement which provides as follows:

> **7.9** An employee with employment security who has exhausted maximum seniority at his/her home location may displace in keeping with his seniority elsewhere on his basic seniority territory or on the region pursuant to the provisions of this article 7. However, such employee will not be required to displace beyond his home location if this would result in a junior employee being placed on ES status. An employee exercising this option shall not forfeit ES providing he otherwise maintains eligibility.

It further points to provisions of Item 1 of the letter of understanding of October 30, 1996 which provides as follows:

> **1.** Employees affected by the [article 8] notices will not be required to displace beyond their home location.

The Company relies on the application of article 7.3(a) of the Job Security Agreement which provides, in part, as follows:

> **7.3 (a)** An employee who has employment security under the provisions of this article and who is affected by a notice of change issued pursuant to article 8.1 of the Job Security Agreement, shall be required to do the following, on an ongoing basis, provided the employee is qualified or can be qualified in a reasonable period of time, in order to protect his ES:
>
> **(1)** exercise his seniority on his Basic Seniority Territory (BST) in accordance with the terms of the collective agreement.

The facts are not in dispute. It appears that upon the implementation of the transfer or lease of the Company's Ottawa Valley territory to the Trans-Ontario Railway, and the abolishment of his permanent position, Mr. Fisher elected not to displace beyond his home location, as doing so would, in any event, have resulted in a junior employee being placed on employment security status. In the result, he therefore elected to remain at home, receiving employment security protection in the form of wages and benefits. Subsequently, however, after the displacement process was complete, a job vacancy became open at a location other than the grievor's home location, in Sudbury, albeit within the same basic seniority territory. The Company then forced the grievor, as the senior employee on employment security, to exercise his seniority to protect the temporary vacancy in Sudbury.

The Brotherhood asserts that that requirement effectively negates any real protection otherwise accorded by the eight on eight rule, and is in violation of the overall intention of the Job Security Agreement, as well as Item 1 of the letter of understanding of October 30, 1996. It submits that the provisions of the Job Security Agreement relied on by the Company, and in particular article 7.3(a)(1) must be read in conjunction with article 7.9, with the result that the grievor cannot be compelled to assume a position at another location which, by the proper application of the bulletining procedures of the collective agreement, should have been awarded to the senior qualified local applicant who, in the instant case, would be an employee who does not have employment security protection.

The Arbitrator has difficulty sustaining the position of the Brotherhood in this case. This Office has given extensive consideration to the general principles underlying the Job Security Agreement and the concept of employment security. (*See, e.g.,* **CROA 2074, 2430** *and* **2535**.) The central theme underlying the employment security bargain was expressed as follows in **CROA 2430**:

> … Commensurate with the extraordinary protection of employment security accorded to senior employees under the agreement, however, is the obligation of employees with such benefits and protections to make themselves available to protect the highest rated available work which their qualifications and seniority will allow. …

There can be little doubt that the language of article 7.3(a)(1) of the Job Security Agreement would, on its face, clearly support the position argued by the Company in this matter. By the terms of that article the grievor would appear obligated to exercise his seniority to protect work on his basic seniority territory, which would include the temporary vacancy which is the subject of this dispute.

The issue then becomes whether the negotiation of the eight on eight rule found in article 7.9 of the Job Security Agreement and Item 1 of the letter of understanding of October 30, 1996 can be said to have amended or altered that obligation. When regard is had to the origins of the eight on eight rule, as incorporated within article 7.9 of the Job Security Agreement, the Arbitrator cannot sustain the position of the Brotherhood. As argued by the Company, that provision was intended to provide a measure of relief against relocation to employees in the initial exercise of displacements occasioned by the implementation of a technological, operational or organizational change within the meaning of article 8 of the Job Security Agreement. It allows, in the process of displacement, for a senior employee with employment security to avoid having to displace away from his or her home location if doing so merely places another junior employee on employment security status. That provision does not, however, speak to or in any substantial way amend the broader obligation of general work protection, fundamental to the scheme of employment security, found within article 7.3(a)(1) of the Job Security Agreement. When, as occurred in the instant case, a vacancy arises within an employee's basic seniority territory, that employee is compelled, as a condition to protect his or her employment security, to exercise the fullest seniority rights to fill such a vacancy. For reasons elaborated previously by this Office, that specific obligation overrides the general job bulletin procedures of article 14 of the collective agreement (**CROA 2535**).

As the Brotherhood suggests, there is an arguable anomaly in the prospect of an employee initially avoiding relocation by invoking the eight on eight option and, some time later, being forced to another location when a vacancy becomes open, particularly when junior employees who may also be drawing employment security benefits may not be so compelled. However, as the jurisprudence reveals, the workings of employment security have been fraught with anomalies in their actual implementation. Indeed, it is the recognition of a possible favouring of junior employees on employment security which gave rise to the incorporation of the eight on eight rule within the terms of article 7.9. It would obviously be open to the parties, should they deem it appropriate to do so, to amend their agreement so as to force a junior employee on employment security status to move to an unfilled vacancy away from the home location, rather than compel the exercise of maximum seniority, as would otherwise occur in the operation of article 7.3(a)(1) of the Job Security Agreement. They have not, however, made any such agreement to date, and absent language within the Job Security Agreement to that effect, or otherwise modifying the obligations to which Mr. Fisher is bound, the Arbitrator cannot conclude that there has been any violation of his rights under the terms of the Job Security Agreement, the letter of understanding of October 30, 1996 or the collective agreement. Nothing in these conclusions should, obviously, be taken as preventing the parties from entering into discussions to bring about what they may consider to be a more equitable or workable result in this or future cases.

For the foregoing reasons the grievance must be dismissed.

March 18, 1997

(signed) MICHEL G. PICHER
ARBITRATOR