CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2867

Heard in Montreal, Thursday, June 12, 1997

concerning

CP EXPRESS & TRANSPORT

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Mr. William Matthews (the grievor) and the Union assert that the grievor has been denied his entitlement of 156.6 weeks of layoff benefits and that he was improperly denied his entitlement to layoff benefits during the initial 8 week period when his benefits were reduced by 80%. The grievor and the Union claim full compensation to the grievor to which he is entitled under the collective agreement and the Job Security Agreement.

EX PARTE STATEMENT OF ISSUE:

The CPET Saint John terminal closed on September 17, 1993 and at the time the grievor was presented with certain options. In the end it was agreed with the Company that the grievor would receive job security benefits commencing November 30, 1993 for a period of 156.6 weeks. Mr. Matthews' date of hire was August 19, 1963.

In fact the benefits commenced September 21, 1993 in error and at 20% top up payment to his UIC (which he did not receive) and resulted in an 80% reduction in benefits for a period of 8 weeks. Later on or about June 22, 1995, after a period of 85 weeks on benefits the Company unilaterally stopped the benefits claiming that he was not entitled to receive benefits any longer.

The Union and the grievor assert that he is entitled to receive layoff benefits for the full period of the 156.6 weeks; that the Company had agreed that he would receive the benefits for this period of time; and/or that the Company is estopped from asserting that his entitlement ends after a period of 85 weeks. The grievor asserts that all the elements of estoppel are present and that he made decisions both at the time of the agreement and thereafter in reliance of his receiving the benefits for a period of 156.6 weeks.

The Union and the grievor also assert that the grievor is entitled to the 80% of the layoff benefits that he did not receive for the first 8 weeks of benefit.

The Company asserts that the grievor has received his full entitlement under the Job Security Agreement.

FOR THE UNION:

(SGD.) D. J. DUNSTER
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
B. F. Weinert	– Director, Employee Relations, ILFS, Toronto

And on behalf of the Union:

H. F. Caley	– Counsel, Toronto

D. Dunster – Executive Vice-President

AWARD OF THE ARBITRATOR

The record discloses that the grievor, Mr. William Matthews, was hired by the Company, then CP Express, on August 19, 1963. He took employment as a casual or on-call employee, retaining his permanent employment with a milk distributor, Baxter Dairies Ltd. Although full records are not available, it appears that his work as a casual employee varied between 5 days and 13 days per month. It is common ground that Mr. Matthews assumed full-time permanent employment with CP Express on or about June 8, 1976. He remained employed at the Saint John, New Brunswick terminal of CP Express, and later CP Express & Transport, until the closure of the Saint John terminal on September 18, 1993. The grievance concerns the grievor's entitlement to layoff benefits.

It appears that the grievor took accumulated vacation from September 21, 1993 to November 23, 1993, prior to commencing the layoff, which in his case effectively became his severance or retirement. The Union alleges that the Company commenced paying the grievor's job security benefits in error, prematurely, in September 1993, for a period of eight weeks. This, it asserts, resulted in a shortening of the weeks Mr. Matthews would have received 80% of his weekly rate in 1995, causing a net loss to him of $3,264.00. That forms the first part of the grievor's claim.

The Company submits that the grievance is untimely, and further denies that the payments made during the first eight weeks were in error. It's Counsel notes that on or about December 30, 1993, he was advised that the payments were in order, and took no step to grieve the matter until the instant grievance was raised in or about July of 1995.

On this aspect of the grievance the Arbitrator must agree with the Company's position as to timeliness. It is clear that in December of 1993 Mr. Matthews knew, or reasonably should have known, of the facts which he alleges justify the part of his grievance concerning the first eight weeks of his layoff, and the payments received for that period. Article 17 is clear that the fourteen day time limit for filing a grievance is mandatory, and that grievances not progressed within the time limit are considered to be dropped. In the circumstances, I am compelled to conclude that the part of the grievance relating to the first eight weeks of severance payments received by Mr. Matthews is untimely and therefore inarbitrable.

I turn to consider the second aspect of the grievance. The parties are not in dispute as to the facts relevant to it. The layoff benefit of an employee under the Job Security Agreement is calculated on the basis of cumulative compensated service (C.C.S.). When Mr. Matthews claimed layoff benefits his claim form was filled out by then Terminal Foreman Clyde Sands, himself a unionized employee functioning in a lead hand capacity. Mr. Sands credited the grievor with cumulative compensated service calculated from his first date of hire as a casual employee, which would have resulted in Mr. Matthews being eligible for layoff benefits for a total of 156 weeks. It is not disputed that Mr. Matthews then opted for layoff and declined the option of a $45,800.00 lump sum payment, or the possibility of displacing to other work in Moncton.

The Company maintains that the calculation of C.C.S. made by Mr. Sands was in error, as it should not have included any service as a casual employee, prior to June 8, 1976. On that basis, it says the grievor's entitlement was immediately adjusted to 85 weeks by its head office, although it concedes that it has no evidence to rebut the account of Mr. Matthews that he was never advised of the adjustment at the time. It seems that the grievor only became aware of the Company's position when his layoff benefit payments ceased after 85 weeks, on or about June 15, 1995. This was explained to Mr. Matthews by telephone upon his enquiry on June 22, 1995, and was confirmed in writing by the Company's Director of Labour Relations on July 10, 1995. At or about the same time the grievor's claim to 156 weeks of layoff benefits was raised in meetings between the Company's Director of Labour Relations and the Union's representative. It does not appear disputed that in the last week of July the Union's representative, Mr. Dennis Dunster, gave the grievor's entire file to Mr. Neil, the Company's Director of Labour Relations.

The Company maintains that the second claim is not arbitrable as no clear grievance document is filed and the grievor's claim is untimely. The Arbitrator cannot agree. The unrebutted evidence of Mr. Dunster, which I accept, is that because of substantial difficulties facing both parties at the time, it was generally agreed to waive the strict application of time limits and it was understood between Mr. Dunster and Mr. Neil, the Director of Labour Relations, that Mr. Matthews' claim was to be treated as a timely grievance. Further, in my view, given that Mr. Matthews was advised of the Company's position by letter dated July 10, 1995, the grieving of the matter by Mr. Dunster in the manner described, in the last week of July, sufficiently complied with the time limits provided in article 17.

Alternatively, if it were necessary to so find, I would conclude that the Company's action, if it were contrary to the Job Security Agreement, would constitute an ongoing breach which Mr. Matthews was entitled to raise within the 156 week period. (**Re Port Colborne General Hospital and Ontario Nurses Association** (1986), 23 L.A.C. (3d), 323 (Burkett))

I now turn the consider the merits of the second aspect of the grievance. On the issue of the grievor's entitlement to layoff benefits, the Arbitrator has considerable difficulty with the position of the Union. As a general rule, job security protections are associated with the purpose of protecting the rights of permanent, full time employees. In this area the bargain between employer and union is generally predicated on providing a degree of benefits as protection against the hardship of layoff in recognition of the value of long service to the employer, generally permanent and full time. While it is open to the parties to a collective agreement to extend job security benefits to casual or temporary employees, a board of arbitration will generally require clear and unequivocal language within a job security agreement or a collective agreement to reflect their mutual intention to do so. In the instant case the Job Security Agreement provides as follows:

ARTICLE 7 – CASUAL EMPLOYEES

Employees who are not available for full-time work are not covered by the Job Security Agreement.

Cumulative compensated service is defined in Appedix B to the Job Security Agreement. It appears clear to the Arbitrator that by virtue of article 7, that appendix, and the concept of C.C.S. as it appears in the various parts of the Job Security Agreement, can have no application to an employee's service as a casual employee. That, moreover, appears to be the way these provisions were applied for many years by CP Express and CP Express & Transport, up to and including the time of the grievor's layoff. On the whole, I am compelled to conclude that the language of the Job Security Agreement, supported by the apparently unchallenged practice of the employer over many years, confirms the position of the Company that the grievor is not entitled to include service as a casual employee in the calculation of his C.C.S. for the purposes of layoff benefits, or indeed for any purpose under the Job Security Agreement.

The conclusion does not, however, entirely dispose of this matter. It appears to the Arbitrator that the equitable doctrine of estoppel has a measure of application in this case. It is not disputed that the misinformation provided to the grievor by Mr. Sands caused him to forego the option of a lump sum payment at the time of his election of layoff in 1993. The material and representations before me confirm that Mr. Sands, although not a member of management, was authorized to fill out the layoff election forms of employees. While I am satisfied that he erred in his calculation of C.C.S. for Mr. Matthews, it would appear that no one in management ever communicated that error to the grievor, so that he could make his choice as between layoff benefits and the alternative of a lump sum payment on a properly informed basis. By the Company's own admission, that failure of information resulted in the grievor not receiving a cash buy-out which would have been more that $5,000.00 more than he in fact received by the payment of 85 weeks' layoff benefits. Given the failure of the Company to properly advise Mr. Matthews as to his options, and in particular the fact that it did not explain Mr. Sands' error to him in time to allow an informed election, I am compelled to conclude that the doctrine of estoppel must apply, and that the grievor should be placed in a position whereby he receives no less than the difference in funds that would correspond to the full benefit of the buy-out package he would obviously have otherwise elected.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that Mr. Matthews be paid forthwith, with interest, the difference between the amount of the lump sum payment he was entitled to elect and the actual money he has received. I retain jurisdiction in the event of any dispute with respect to the calculation of compensation, or any other aspect of the interpretation or implementation of this award.

June 20, 1997

(signed) MICHEL G. PICHER
ARBITRATOR