CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2886

Heard in Montreal, Thursday, 11 September 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

EX PARTE

DISPUTE:

Applicability of a General Wage Increase to the St. Clair Tunnel Maintenance of Earnings Agreement

EX PARTE STATEMENT OF ISSUE:

On March 5, 1995, the Company and the Council entered into an agreement to address the effects of the new St. Clair Tunnel. Part of this agreement covered employees adversely affected through a maintenance of earnings. On January 1, 1996 a general wage increase of 2% became effective. Under the terms of the agreement which states "An employee's "basic weekly pay" as determined pursuant to this Clause (g) will be amended by the amount of any general wage adjustments applicable during the 3 year period immediately following the effective date of benefits entitlement."

The Company has declined to apply the general wage increase to employees who, at the time of calculation of their maintenance of earnings, were at the cap level stated in paragraph (g)(iii) NOTE.

The Union appealed the Company's decision not to apply the general wage increase to theses employees.

The Company declined the Union's appeal.

FOR THE COUNCIL:

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. T. Mackenzie	– Labour Relations Officer, Toronto
A. E. Heft	– Manager, Labour Relations, Toronto
P. W. Parker	– Operations Service Leader, Moncton

And on behalf of the Council:

M. P. Gregotski	– General Chairman, Fort Erie
G. J. Binsfeld	– Vice-General Chairman, Fort Erie
G. Bird	– Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

In March of 1995 the opening of the new St. Clair tunnel caused the parties to negotiate an agreement to deal with the adverse effects of that material change, following an article 79 notice issued on October 14, 1994. The resulting special agreement, entitled the St. Clair Tunnel Maintenance of Earnings Agreement, contains provisions for maintenance of basic rate benefits for employees for a period of three years. Among the provisions of the agreement relative to this dispute are the following:

> **(b)** An eligible employee shall have his basic rate maintained by payment to such employee the difference between his actual earnings in a four-week period and four times his basic weekly pay. Such difference shall be known as the employee's incumbency. In the event the employee's actual earnings in a four-week period exceeds four times his basic weekly pay, no incumbency will be payable.
>
> **(c) An employee's "basic weekly pay" as determined pursuant to this Clause (g) will be amended by the amount of any general wage adjustments applicable during the 3 year period immediately following the effective date of benefits entitlement.**
>
> ...
>
> **(g)** For the purpose of this Agreement, the term "basic weekly pay" and "weekly salary" are defined as:
>
> > **(i)** An employee assigned to a regular position in yard service, including yard service spare boards, at the time of displacement or layoff, 5 days' or 40 hours' straight time pay, including shift differential when applicable.
> >
> > **(ii)** For an employee in road service, including employees on road and joint spare boards, one-fifty second (1/532) of the total earnings of such employee during the twenty-six full pay periods preceding his/her displacement or layoff.
> >
> > **(iii)** When computing "basic weekly pay" pursuant to sub-paragraph (b) above, any pay period during which an employee is absent for seven consecutive days or more because of bona fide injury, sickness in respect of which an employee is in receipt of weekly indemnity benefits, authorized leave of absence, or laid off, together with the earnings of an employee in that pay period, shall be subtracted from the twenty-six (26) pay periods and total earnings. In such circumstances "basic weekly pay" shall be calculated on a pro-rated basis by dividing the remaining earnings by the remaining number of pay periods.
> >
> > **NOTE: The amount of basic weekly pay for an employee in road service will in no case exceed $1,208.44 for locomotive engineers, $1,057.18 for conductors and $977.79 for assistant conductors.**
>
> (emphasis added)

The parties are disagreed as to the impact of the note to sub-paragraph (g)(iii) of the agreement. The Council submits that the cap that is provided for in the note is limited to the initial calculation of the basic weekly pay for an employee in road service. It claims, however, that the capped amounts can be, and are intended to be, increased by general wage adjustments, as in contemplated in paragraph (c) of the agreement. The Company, on the contrary, maintains that the cap provided for in the Note to sub-paragraph (g)(iii) is intended as a permanent one-time cap which remains in place for the entire three-year period of the agreement. In other words, as the employer would have it, a conductor who qualifies for the capped maximum basic weekly pay of $1,057.18 cannot have that amount augmented by the amount of any general wage adjustments during the course of the three-year term of the agreement.

The capping of maintenance of earnings benefits is a relatively recent development within the railway industry. The parties referred the Arbitrator to examples of other collective agreements in which such caps to maintenance of earnings are provided. For example, the Company's collective agreement with locomotive engineers contains a note similar in language to the note in dispute in this case. The note also includes specific language, however, stating in part "the annual maximum ... shall be increased by the amount of any future general wage adjustments." Similarly, the

Company points to the memorandum of agreement between Canadian Pacific Limited and the Canadian Council of Railway Operating Unions concerning the implementation of remote control locomotive systems and belt pack technology for the pull down assignments in the Toronto terminal. That special agreement also includes a capped amount of basic weekly pay for employees in road service. Specific language therein further states "these amounts will be amended by the amount of any general wage adjustments applicable during the five year period immediately following the Effective Date."

As the Council's representative stresses, it is difficult to draw any conclusion as to the intention of the parties to the St. Clair tunnel maintenance of earnings agreement by reference to maintenance of earnings agreements negotiated between the Company and another union, or for the employees of an entirely different company. At a minimum, it can however be argued on behalf of the Union that the concept of both capping and annually increasing basic weekly pay for the purposes of maintenance of earnings is not foreign to the industry.

In the Arbitrator's view the dispute must be resolved on the language of the special agreement as I find it. When regard is had to the specific provisions concerning basic weekly pay, it appears to the Arbitrator that paragraph (c) is a complete code in respect of the impact, if any, of general wage adjustments. By its clear language, that provision contemplates that basic weekly pay "as determined pursuant to this Clause (g)" is to be increased in accordance with annual general wage adjustments over the three year period of the agreement. Within clause (g), which defines "basic weekly pay", the note in dispute is found separately under sub-paragraph (iii). Given that configuration of provisions, the Arbitrator is inclined to accept the submission of the Council that the cap was intended to operate at the initial stage of establishing an employee's basic weekly pay. There is nothing in the language of clause (g) which, in my view, would suggest that the basic weekly pay so determined is not basic weekly pay contemplated within clause (c). To put the matter differently, a logical reading of the document suggests that the parties agreed in clause (g) on a formula for establishing everyone's basic weekly pay and, by the separate terms of clause (c), made it clear that all employees are thereafter to have their basic weekly pay, such as it may be under clause (g), adjusted in accordance with the amount of any general wage adjustments applicable during the three-year term of the agreement.

The Arbitrator is also persuaded that the interpretation of the Council is supportable on a purposive view of the agreement. It is evident that the Company has a legitimate interest in negotiating a capped form of initial basic weekly pay, an interest acknowledged by the Council's willingness to negotiate such a cap. However, it is in general keeping of the purpose of maintenance of earnings benefits that they not be eroded unduly by the mere passage of time. The spirit of special agreements which contain maintenance of earnings protection has, historically, been to preserve the earning capacity *status quo* for the employees affected. Long established provisions for the scaling upwards of basic weekly pay in conformity with annual wage adjustments have given fair recognition to that general intention of maintenance of earnings agreements. If, in the instant case, the parties had intended to depart from that general practice, they could have chosen clear and unequivocal language reflecting their intention to do so. For the reasons related above, however, I find a contrary intention in the language of the document before me.

The grievance is therefore allowed. The Arbitrator finds and declares that the interpretation of clause (c) of the St. Clair Tunnel Maintenance of Earnings Agreement advanced by the Council is correct, and directs that all employees coming within the scope of the agreement be granted the benefit of any general wage adjustments in the calculation of their basic weekly pay for the purposes of the agreement.

September 15, 1997

(signed) MICHEL G. PICHER
ARBITRATOR