CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2889

Heard in Montreal, Tuesday, 14 October 1997

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Policy grievance for employment security benefits on behalf of Ms. S. Provost, Mr. K. Williams, Mr. G. Uhlman and Mr. F. Khan.

EX PARTE STATEMENT OF ISSUE:

As a result of Article R of Justice Mackenzie's award, a number of severance packages were required to be made available equal to the number of employees normally receiving employment security (ES) payments and 57 other positions.

In accordance with paragraph 7 of Article R of the award, when the senior regularly assigned employees opt for enhance retirement opportunities (ERO) or for early departure incentives (EDI), then employees on ES are to be recalled to work in priority to laid-off employees notwithstanding Article 13 of collective agreement no. 2.

It is the Union's submission that the Mackenzie Award provided the means by which the Company could move current ES employees into regular positions thereby eliminating their entitlement to ES. It is the Union's submission that pursuant to the language in the Award, the Company had an obligation to provide an equal number of ERO or EDI packages to senior regularly assigned employees in order to open those positions up to junior ES employees so that those junior ES employees could fill the positions thereby relinquishing their entitlement to ES.

It is the Union's contention that the Company did not properly follow the instructions in the Mackenzie award and subsequently, when ES employees were laid off at the end of the season, the Company overstepped its authority under the Mackenzie award and unilaterally denied those employees their ES entitlement. Those employees are therefore entitled either to an ERO or EDI package or to a regularly assigned position or to continue with their ES entitlement.

The Union requests full redress of wages and compensation with interest to the affected employees.

The Corporation declined the grievance and maintains that the intent of article R was to relieve the Corporation's ES liability. The Corporation further maintains that the award was properly applied in that an equal number of severance packages were given for the number of employees on ES at that time.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Manager, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
D. S. Fisher	– Director, Labour Relations, CNR, Montreal
A. S. Wepruk	– National Coordinator, CAW, Montreal, Witness

And on behalf of the Union:

K. Wittman	– Counsel, Winnipeg
D. Olshewski	– National Representative, Winnipeg
F. Khan	– Grievor

AWARD OF THE ARBITRATOR

The instant dispute turns upon the interpretation and application of the mediation-arbitration award issued by Mr. Justice Mackenzie on June 13, 1995. That award, issued pursuant to Section 53 of the **Maintenance of Railway Operations Act, 1995** dealt, in part, with the contentious issue of the Corporation's ongoing employment security liability, and its requests for relief from that burden before the Commission. The award of the Commission provides for early retirement opportunities and early departure incentives as a means of reducing the complement of the Corporation, and achieving an equivalent reduction in the employees on employment security, many of whom originally gained that status in the operational and organizational change implemented as part of massive reductions in the Corporation's operations in January of 1990. The process for the reduction of the ES liability of the Corporation is provided for as follows under article R of the Mackenzie award:

ENHANCED RETIREMENT OPPORTUNITIES AND EARLY DEPARTURE INCENTIVES

1. The Corporation, between September 1, 1995 and December 31, 1997, may abolish positions equal in number to the total of the following:

a) the number of employees under this collective agreement who are normally receiving employment security payments, pursuant to the provisions of Article 8.9 of the Supplemental Agreement governing Employment Security and Income Maintenance (hereinafter referred to as the "Supplemental Agreement");

b) Fifty-seven other positions.

Provided that the positions vacated through normal attrition will be deducted from the number of positions which may be abolished under this section.

2. For each position abolished pursuant to section 1 hereof, a retirement opportunity (hereinafter referred to as an "Enhanced Retirement Opportunity") will be offered to an employee who is at least 55 years of age and whose service and age total a minimum of 85 points. The pension offered shall be an unreduced pension based on the employee's years of pensionable service.

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4. Retirement opportunities will be offered to eligible employees in order of seniority. If the number of positions to be abolished exceeds the number of applications for retirement, then the Corporation will offer an Early Departure Incentive equal in number to the remaining positions to be abolished in order of seniority to employees with four or more years of service as follows:

a) $50,000.00;

b) 2 weeks salary at the basic weekly rate of the employee's position for his first year of service; and

c) one week's salary at the basic weekly rate of the position for each subsequent full year of service.

The Corporation's employment relationship with the employee will be severed upon acceptance of the Early Departure Incentive.

5. Enhanced Retirement Opportunities and voluntary Early Departure Incentives may be offered concurrently and shall be open for acceptance for a minimum of 60 days. Enhanced Retirement Opportunities will take priority over Early Departure Incentives in matching departures to positions abolished.

6. If, following the application of sections 1 to 5 above, there are insufficient retirements and departures to match the number of positions to be abolished, then the junior employees equal to the unmatched positions shall be required to accept an Early Departure Incentive in full satisfaction for the termination of their employment with the Corporation, and their employment relationship with the Corporation will be severed accordingly.

7. If senior regularly assigned employees opt for Enhanced Retirement Opportunities or Early Departure Incentives, then the employees presently on employment security will be recalled to work in priority to laid-off employees notwithstanding Article 13 of the collective agreement. If there are insufficient applications, then the employees currently on employment security must follow the procedures outlined in section 6. (Appendix 1)

Article 13 of the collective agreement governs staff reductions, displacement and recall to service. As is evident from the foregoing, the provisions of article 13 are by-passed to allow for the return to work to remaining positions of employees on employment security, in preference to any senior laid off employees. Significantly, during the hearings before Mr. Justice Mackenzie the Corporation also asked for the ability to by-pass article 12, the provision of the collective agreement which governs the bulletining and filling of vacant positions. That would have allowed employees with employment security, however junior, to have priority access to positions posted as a result of the vacancies made available by the implementation of the enhanced retirement opportunities and the early departure incentives, in preference even to non laid-off senior employees. However, the Union resisted that proposal of the Corporation, insisting that any vacant positions which might result should nevertheless be bulletined and be made available, in the normal course, to employees on the basis of their seniority. The evidence before me establishes that the parties well understood that this might create certain anomalies, because some senior employees had previously forfeited their employment security, while junior employees, including the grievors in the case at hand, continued to hold employment security dating back to 1990. Employment security was an important benefit to those junior employees who, it is not disputed, typically faced layoff on an annual basis generally during the winter months, in the off-peak travel season.

In the result, when the newly vacant positions resulted they were bulletined in accordance with article 12 and filled on the basis of seniority. Junior employees unable to successfully bid on vacancies were then laid off, and those among them who previously had employment security were deemed to no longer have that benefit. The Corporation's representative submits that that was the very bargain and outcome consciously sought before Mr. Justice Mackenzie, and well understood as a result of the Union's insistence that there be no notwithstanding clause with respect to article 12, which governs the filling of positions by seniority. He stresses that if the interpretation is otherwise, as urged by the grievors, the Corporation would have realized little or nothing out of its efforts to reduce its employment security liability through the Mackenzie award.

The evidence discloses that the Corporation had twelve employment security liabilities in VIA West. On that basis, twelve ERO/EDI packages were made available within that region. As noted above, the parties agreed that vacancies created by the taking of those packages would be bulletined pursuant to article 12.3 of collective agreement no. 2. In the fallout of that process, a number of junior employees with ES status found themselves without enough seniority to successfully bid on vacancies. Subsequently, with the fall downsizing, they found themselves laid off on or about December 1, 1995, with entitlement only to layoff benefits rather than the previous employment security protection which they enjoyed. On behalf of the grievors, the Union's representative submits that it was not the intention of the Mackenzie award to remove the employment security of the grievors, should they find themselves unable to successfully bid on vacancies created by the implementation of the ERO/EDI packages. Upon a careful review of the history of the Mackenzie award, as well as the language of the learned commissioner, the Arbitrator is unable to agree.

The evidence of both management and union representatives tendered before me is as one with respect to the intention of the Mackenzie award. There can be no question but that both parties were fully cognizant that the Union's position, which the Arbitrator considers understandable, to the effect that the bulletining and filling of positions by seniority under article 12 should not be waived, would have the inevitable effect of causing employees previously on employment security to be compelled, by reason of their limited seniority, to face layoff. As harsh as that outcome may seem, it must be borne in mind that, as disclosed in many prior cases involving the administration of employment security within the railway industry, the concept of employment security has inevitably given rise to difficult results including, for example, the forcing of senior employment security employees to take positions in other locations, while junior ES employees were able to remain in their home location, to cite but one instance. The problem

of worker equity created by ES was well described in the award of June 14, 1995 issued by the Mediation-Arbitration Commission chaired by the Honourable Mr. Justice George W. Adams, in the dispute between CN and the CAW clerical employees where, at pp 56-7, the following appears:

> In Canadian labour relations, the extent of employment security ("ES") available to railway employees is almost unique. Indeed, very few North American private sector employers have been willing to make this kind of commitment to their employees. The absence of guarantees in product markets makes such guarantees in labour markets difficult for employers to contemplate. CP and CN appear to have agreed to this benefit in 1985 as a logical extension of the job security dialogue which they have been having with their trade unions for over a quarter of a century. Over that period, however, the two railways were essentially a regulated duopoloy. But since 1987, these two employers have been increasingly subjected to market pressures and this has caused them to question the wisdom of these earlier ES commitments. As a result, ES has dominated every recent round of collective bargaining to the disadvantage of other important areas of these collective bargaining relationships. 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 has become intolerable.
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> This degree of ES also produces difficulties for recipient workers and their trade unions. For example, it is a benefit difficult to improve upon and impossible to give up. It can, however, produce real dissension within the ranks of workers as more senior employees are required to work and to perform the least desirable tasks, while junior redundant employees have less demands made of them. In fact, the benefit produces such perverse rules as junior employees on ES status having to take available work before their senior counterparts. There is also the problem of junior employees on ES working more desirable shifts than active senior employees and being able to take their annual vacations during the more preferable vacation periods.
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> From the employee's point of view, the benefit may represent a deterrent to undertaking the personal burdens of job search, retraining and relocation. A description that comes to mind is that of "golden handcuffs". While no employee wants to sit at home, the problems associated with relocating or even finding other available work closer to home, particularly for the older worker, can be quite daunting. Once having achieved lifetime employment security, individual employees would likely require their employer to be on the brink of bankruptcy to give it up.

As this Office has noted previously, it is of the essence of collective bargaining that trade-offs and compromises are made which, on occasion, may have adverse consequences on a particular group of employees while working to the benefit of others. As difficult at that may appear, it is entirely appropriate, and is an essential feature of a free collective bargaining system in which a trade union, as exclusive bargaining agent for all employees, is vested with the duty and obligation to seek, as best it can, the collective bargaining outcome which will be most beneficial to its membership in general. In the instant case, for entirely legitimate reasons, the Union opted for the preservation of the bulletining and filling of positions on the basis of seniority, the inevitable result of which was the layoff of a number of employees, without any further benefit of employment security. As hard as that result may be for the individuals affected, it was clearly the result which was mutually intended, and which fairly flows from the benefit gained by employees who were provided access to enhanced retirement opportunities and early departure incentives, as well as to the Corporation, which gained the relief which it sought in respect of its then ongoing employment security liability. It is not for this Arbitrator to question that trade-off, much less to disregard it.

For the foregoing reasons the Arbitrator is satisfied that the interpretation advanced by the Corporation in the instant case is fully consistent with the intention of the Mackenzie award, particularly when regard is had to the positions of the parties before the Commissioner with respect to the ultimate preservation of the bulletining and filling of positions provisions of article 12 of the collective agreement. For these reasons, therefore, the grievance must be dismissed.

October 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR