CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2895

Heard in Montreal, Thursday, 16 October 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

A claim on behalf of Messrs. G. Sand and M. Engley for benefits contained in Option Three (Severance Payment) of article 7.14 of the Employment Security and Income Maintenance Agreement dated 14 June 1995.

JOINT STATEMENT OF ISSUE:

As the result of permanent reductions in the Edmonton Terminal, Mr. G. Sand and Mr. M. Engley elected to retire from the Company with a separation allowance pursuant to article 7 of the Employment Security and Income Maintenance Agreement dated 14 June 1995.

It is the Union's position that as a result of a transfer of benefits as stated in article 7.17 of the Employment Security and Income Maintenance Agreement Messrs. Sand and Engley were entitled to chose option one, two or three listed in article 7.14 of the E.S.I.M.A. rather than being required to sever under option one of article 7.14.

The Company denies the request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) R. STORNESS-BLISS	(SGD.) J. TORCHIA
FOR: NATIONAL REPRESENTATIVE	FOR: SENIOR VICE-PRESIDENT

There appeared on behalf of the Company:

D. Lanthier	– Labour Relations Officer, Edmonton
J. Torchia	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

R. Storness-Bliss	– National Representative, Vancouver

AWARD OF THE ARBITRATOR

At issue in the instant case is the interpretation of the award rendered by the Arbitration-Commission chaired by the Honourable Mr. Justice George W. Adams, dated 14 June 1995. That award dealt, in part, with optional severance opportunities for employees and mandated, in part, as follows at pp 59-60:

> Enhanced bridging and early retirement allowances shall be made available to ES employees, as provided for in the CP and RCTC agreement.
>
> Relocation allowances and costs as provided for in the CP and RCTC agreement.
>
> Transfer of benefits as provided for in the CP and RCTC agreement.
>
> Enhanced optional severance payments as provided for in the CP and RCTC agreement.

The Union asserts that the intention of the Adams award was to incorporate article 3.12 of the memorandum of agreement binding CP and the RCTC, as reflected in a document dated March 12, 199, which provides as follows:

> **3.12** Employees eligible for early retirement are not entitled to the benefits contained in article 3, however, such employees will be entitled to article 6 relocation benefits if required to relocate in order to hold a permanent position.

The Union submits that the above provision must be read in concert with article 3.10 of the CP/RCTC agreement of March 12, 1995, which reads as follows:

> **3.10** An employee affected by a change pursuant to article 1.1(a), must decide, prior to the implementation of that change, whether he wishes to be governed by the rights and obligations of either article 3 or article 4 of this Plan.

In the Union's view, as provided under article 3.10, employees, including employees envisioned by article 3.12, are entitled to elect the rights and obligations of article 4. Under the terms of that article five options are available to the employee, once he or she has fully exhausted seniority and fulfilled all obligations under the terms of article 4.1, as described in article 4.2:

> **4.2 OPTION ONE**
> If the employee is eligible for early retirement under the Company pension rules, the employee may elect to take early retirement with a separation allowance in accordance with the VIA formula (including benefits as per Special Agreements, that is, Group Life Insurance and extended Health and Vision Care coverage.)
>
> **OPTION TWO**
> If the employee is within 5 years of early retirement under the Company pension rules, the employee may elect to take a bridging package at 65% of his salary with continued benefit plan coverage (Dental, Extended Health and Vision Care and Group Life Insurance until eligible for early retirement) at which time the employee will be given a separation allowance in accordance with the VIA formula, (as per Option One).
>
> If an employee is between 5 and 7 years of early retirement under the Company pension rules, the employee may elect tot take a bridging package at 65% of his salary with continued benefit coverage until retirement, at which time the employee will be given a separation allowance in accordance with the formula provided in Article 3.3(a)iii of the current Job Security Agreement. (Dental continued until early retirement - Extended Health and Vision care and Group Life Insurance continued until normal retirement).
>
> **OPTION THREE**
> Elect to take a severance of $65,000.00. Such employee shall be entitled to have Group Life Insurance and Extended Health and Vision Care benefits fully paid by the Company for one year.

OPTION FOUR

Take leave with full pay for a period of up to three (3) years while attending an educational-training program approved by the Labour Adjustment Committee. Employees will be subject to be called to work while not attending courses. All outside earnings during this period of leave will be deducted from the employee's pay. Upon completion, the employee is to resign from Company service unless there is a permanent position available for which he is the qualified successful candidate. Such employee forfeits any future entitlement to article 3 or article 4 benefits.

Such employee will be treated as a new employee for the purposes of receiving benefits under this agreement and shall forfeit all seniority, however, an employee's prior service shall be recognized for the purpose of pension and vacations.

OPTION FIVE

Elect to receive the following enhanced SUB provided the employees has fully exercised seniority on the Basic Seniority Territory.

08 - 15	years CCS	.....2 years
16 - 22	years CCS	.....3 years
23 - 29	years CCS	.....4 years
30 plus	years CCS	.....5 years

Benefit level - 80% all years

Employees electing option 5 may elect, at the same time, to continue to be covered by any or all of the current benefits (Dental, Extended Health and Vision Care and/or Group Life Insurance) at their expense. The cost of such benefits will be deducted from the employee's SUB payment on a monthly basis. An employee's decision to elect one or all of these benefits will be binding for the duration during which the employee is in receipt of SUB. (If Montreal Trust can not make the deductions the employee will have to make payment on a pay direct basis.)

The benefits of article 4 of the CP/RCTC agreement correspond to similar benefits provided in article 7 of the ESIMA, and in particular section B, articles 7.13 to 7.16. The grievors purported to elect under article 7.10 of the ESIMA to be covered by article 7, section B. It is the position of the bargaining agent that both Mr. Sand and Mr. Engley are eligible to elect any of options 1, 2 or 3. In support of its position the Union also points to article 7.17 of the ESIMA, dealing with the transfer of benefits, which provides as follows:

> **7.17** Where employees with 8 or more years of CCS and who commenced service prior to January 1, 1994, are affected by a change pursuant to Article 8.1 of this agreement and are unable to hold a permanent position in their bargaining unit, and are required to relocate in order to hold a permanent position in their bargaining unit at their location, Article 7.14, Options 1, 2 or 3 will be offered to senior employees in their bargaining unit in seniority order on the affected seniority list at the location of the affected employee.

The Union's position, very simply, is that the Adams award must be construed as granting to the employees the rights and obligations which appear in the memorandum of agreement of March 12, 1995. It submits that the terms of that memorandum give to employees in the position of the two grievors the choice of options 1, 2 or 3 as provided under article 7.14, as well as under Note 2 to article 7.13 of the ESIMA which states:

> **Note 2:** Any employee may choose options 1, 2 or 3 prior to accepting work outside their bargaining unit.

The Company submits that the Union's interpretation is unduly restrictive and technical, and fails to take into account the full expression of the intention of the parties to the CP/RCTC agreement. Specifically, it points to the language of article 4.1 of the CP/RCTC agreement, as it was finally drafted in relation to the entitlement of employees to option 3. The provision in question provides, in part, as follows:

> **OPTION THREE**
>
> **(i)** An employee who is **not eligible** for a benefit payment pursuant to Options One or Two (A) or (B) may, upon submission of formal resignation from the Company's service, claim a severance payment of $65,000.00
>
> [emphasis added]

It does not appear disputed that the formulation of Option 3 in the CP/RCTC agreement, as related above, emerged as part of a document which became the CP/RCTC Income Security Agreement of May 1, 1995 which, it appears, was executed by the parties on September 26, 1995. The position of the Company, very simply, is that the intention of the parties in the CP/RCTC agreement, from the outset, was that employees eligible for options 1 or 2 are not entitled to elect option 3. That option, as reflected in the excerpt from article 4.1 reproduced above, is available only to employees not eligible for options 1 and 2.

In support of its interpretation the Company has tendered in evidence a letter from CP Rail's Manager, Benefits & Deployment, dated October 7, 1997 which reads, in part, as follows:

> Canadian Pacific Railway has been applying the provisions of article 4, given the following scenario, in this manner:
>
> An employee who has attained the age of 55 years and 30 years of pensionable service (85) points and as the result of a "transfer of benefits" pursuant to article 9.1 of the RCTC Agreement is canvassed to determine if he is interested in the options listed in article 4.1(e) of the IS Agreement.
>
> Employees who qualify for immediate early retirement under the Company's Pension Plan, must elect Option One described in article 4. The employee does not have the option of taking a severance if he is eligible for Option One. This is the proper application and what was negotiated between the parties.
>
> In addition, the Company's application of article 4 of the CP/RCTC Income Security Agreement, with respect to employees who must accept Option One, has not been the source of any grievance put forth by the Union.

It is on the basis of the foregoing interpretation that the Company has proposed the following language for its proposed article 7.12 of the ESIMA, which reads as follows:

> Employees eligible for early retirement are not entitled to the benefits contained in this Section 7A); however, such employees will be entitled to article 7.14 - Option One or article 6 relocation benefits if required to relocate in order to hold a permanent position.

I turn to consider the merits of the parties competing positions. At first blush, the position of the Union has a certain logical attraction. It would posit that the intention of Commissioner Adams was simply to award the terms of the CP/RCTC memorandum of agreement of March 12, 1995, the only document then available to the Mediation/Arbitration Commission, as the terms of the parties' agreement. If that were so, as the Union contends, the more evolved provisions of article 3.12 of the CP/RCTC Income Security Agreement would not come in to play. However, upon a closer examination of the materials tabled, the Arbitrator cannot sustain the position of the Union.

It is important, I think, to place the Adams award in its proper context, and to be mindful of the process which surrounded it. In a passage immediately preceding its award in respect to employment security benefits, at p. 58, the Commission makes the following 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. This is because of the obvious financial pressures facing these employers and the sweeping nature of the existing benefit. It is true that both CP and CN have substantially downsized their workforces in recent years, but this has been a very expensive exercise which is not yet complete. It will only be more expensive in the future considering that so few active employees have less than eight years CCS. Neither CP nor CN is performing in a manner that can justify such a unique benefit standing in the way, as it does, of needed productivity improvement.

> However, it would not be fair, justifiable, or consistent with good labour-management relations to simply eliminate ES protection for existing employees. Both CP and CN must put in place a substantial substitute which responds to the needs of older workers and reflect a reasonable compromise. Indeed, both CP and CN have been sensitive to the need for such compromise as reflected in their agreements reached with other unions. These settlements continue to provide a level of ES benefits unavailable to the vast majority of private sector unionized workers. The Commission has therefore decided to build upon those important precedents while drawing somewhat more heavily, in some instances, on the competing concerns of affected employees.

As is apparent from the foregoing, part of the rationale of the award of the Commission was to establish some reasonable consistency in the employment security agreements binding on the various unions and both CN and CP. In other words, not surprisingly, the Commissioners sought to fashion an award which they viewed as consistent with the emerging pattern of freely negotiated settlements within the industry.

It then becomes important to appreciate the process by which the pattern was then being established. Parties who did reach settlements, such as CP Rail and the RCTC, did so in a preliminary way by executing a memorandum of agreement, as was done in the document of March 12, 1995. Consistent in the process of most forms of collective bargaining, the parties then engaged in refining and re-expressing the original intention of their memorandum of agreement in the form of a final agreement, ultimately to be ratified and executed by the parties. The final document binding CP and the RCTC emerged in written form as the Income Security Agreement of May 1, 1995, a document finally executed by the parties on September 26, 1995.

If, as the Union contends, the parties in fact amended their original memorandum of agreement or, to put it differently, altered their intention, before reducing to writing the final terms of their Income Security Agreement of May 1, 1995, it is arguable that the award of the Adams Commission must be taken as narrowly enforcing the original language of the memorandum of agreement of March 12, 1995. By the same token, it is not clear that the Commission did not have the May 1, 1995 CP/RCTC agreement at the time of its award of June 14, 1995 or, alternatively, that it did not simply intend to incorporate it by reference, even if its details were not fully available.

Upon a careful review of this matter, the Arbitrator is satisfied that the Commission's award was not intended to be limited to the March 12, 1995 document. I am satisfied, on the balance of probabilities, that by the memorandum of March 12, 1995, the parties to the CP/RCTC agreement intended to reduce into a preliminary written form the broad outlines of their agreement or understanding. The more detailed workings of employee entitlements and obligations were, as is now evident, subject to further discussion and refinement, as reflected in the subsequent document of May 1, 1995, which was eventually executed on September 26, 1995. The unrebutted evidence before me, as reflected in the letter of CP Rails' manager, dated October 7, 1997, give no indication that there was ever any reversal of intention or amendment of the original agreement, as expressed in the memorandum of agreement of March 12, 1995, the terms of which were obviously known to the members of the Adams Commission. To put the matter differently, the subsequent document of May 1, 1995 can, according to the evidence before me, fairly be taken to state: "The more elaborate terms of this agreement reflect the intention of the parties as originally expressed in the memorandum of agreement of March 12, 1995." Absent any direct evidence which would suggest a contrary intention, and which would rebut the letter received from CP Rail's manager, the Arbitrator is compelled to conclude, on the balance of probabilities, that the CP/RCTC Income Security Agreement, in its final form, reflects the original intention of the parties, and must be taken as the industry pattern settlement intended to apply to the instant parties, as originally expressed by Mr. Justice Adams in his award of June 14, 1995.

The Arbitrator appreciates the difficulties which the parties to this grievance have had in pleading this case. Because they were unable to negotiate their own agreement, and were compelled by legislation to submit to the will of an independent third party to fashion the terms of their ESIMA, they are now left in the rather unfortunate and dubious position of attempting to argue not only the intention of the Commissioners, but the intention of another railway and another union in respect of the meaning and evolution of their own income security agreement provisions. It would be difficult to find a better object lesson in the value of freely negotiating the terms of one's own collective agreement, and avoiding the distortions and uncertainties that can result when someone else's agreement is forced upon the parties. Be that as it may, however, for the reasons related above, I am compelled to conclude that the original intention of the CP/RCTC memorandum of agreement, and ensuing income security agreement, are to be applied and interpreted in the manner advanced by the Company in the interpretation of the ESIMA.

For all of the foregoing reasons the grievance must be dismissed.

October 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR