CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3040
Heard in Montreal, Thursday, I I March 1999
concerning
ST. LAWRENCE & HUDSON RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

The remedy entitlement of Mr. Jean Noel de Tilly upon his reinstatement.

JOINT STATEMENT OF ISSUE:

Mr. Noel de Tilly was dismissed from Company service on August 8, 1997. The parties have agreed that Mr. Noel de Tilly should be reinstated on the same terms as were ordered in CROA 3022 and that only the remedy entitlement issue would be submitted to the arbitrator.

FOR THE COUNCIL: FOR THE COMPANY:
(SGD.) D. A. WARREN (SGD.) G. CHEHOWY
GENERAL CHAIRMAN FOR: **DISTRICT GENERAL MANAGER, STUH**

There appeared on behalf of the Company:
G. D. Wilson - Counsel, Calgary
G. Chehowy - Manager, Labour Relations, Toronto
C. Westcott - Field Operations Analyst, Toronto

And on behalf of the Council:
P. Sadik - Counsel, Toronto
D. Genereux - Vice-General Chairman, Montreal
R. Lebel - General Chairman, CN Lines East, Quebec
B. Brunet - Local Chairman, BLE, Montreal
R. Michaud - Chairperson, Quebec Legislative Committee, CN Lines East, Montreal
J. Noel de Tilly - Grievor

AWARD OF THE ARBITRATOR

The parties are in agreement that the grievor is entitled to the remedies provided to employee A. Verner in **CROA 3022,** as the circumstances of the two employees are virtually indistinguishable with respect to their entitlement to reinstatement with compensation. The issues in dispute relate solely whether Mr. Jean Noel de Tilly can participate in the benefits of the Trois-Rivieres agreement, and what monetary compensation should be payable to the grievor, having regard firstly to the estimate of his availability for work and secondly, whether he properly mitigated his losses. It is agreed that Mr. Noel de Tilly is to reimburse the Company for all maintenance of earnings payments made to him incorrectly.

I deal firstly with the issue of the application of the Trois-Rivi6res

agreement. It is common ground that the grievor, an employee of more than thirty years' service who served as local chairperson and vice-general chairperson of the United Transportation Union's East General Committee of Adjustment, was at all material times employed in Trois-Rivieres. He was removed from service on June 23, 1997 for alleged improprieties in the making of his maintenance of earnings claims. That discharge is now deemed unjustified by reason of the award of this Office in **CROA 3022,** as applied to the facts of Mr. Noel de Tilly.

Shortly after the grievor's removal from service the Company gave notice to the Council of its intention to close its operations at the Trois Rivi6res terminal. The notice, given on July 21, 1997, led to the negotiation of terms and conditions to minimize the adverse impact of the closure upon the employees in service at Trois-Rivieres. The Trois-Rivieres agreement, concluded November 11, 1997 contains a number of provisions typical of such agreements, including bridging opportunities for persons of senior service. It does not appear disputed that but for his removal from service Mr. Noel de Tilly would have been entitled to such an opportunity, as well as to all other benefits of the Trois-Rivieres agreement, including the opportunity to move to work in Montreal, with related relocation benefits.

The Company takes the position that the grievor is disentitled from any of the protections of the Trois-Rivieres agreement because he was not actively at work at the time it was negotiated. It submits that the long-standing practice between the parties to limit the application of such agreements to employees who are at work, and are therefore adversely impacted by the material change in question. In that regard the Company relies, in substantial part, on the award of this Office in **CROA 2935** where the following comments appear:

> ... In the Arbitrator's view the Council's position fails to appreciate the purposive underpinning of such early retirement incentives. They are provided as part of a series of benefits or advantages made available specifically to minimize the adverse impact of a material change on employees who are actively at work. More particularly, offering early retirement incentives to senior active employees tends to free up complement positions and avoid the layoff of more junior active employees. Very simply, offering early retirement incentives to employees who are not in active service, and who may be on extended medical leaves of absence, does nothing to enhance the work opportunities of persons who are actively at work and who are threatened with unemployment. Nor does it protect the employee on long-term leave against any adverse impacts, since he or she suffers none by reason of the material change.
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> The foregoing understanding of early retirement incentives is reflected in the genesis of material change provisions found in the railway industry. ...

> ... As is clear from the foregoing, the protection of early retirement opportunities was, from the outset, meant to be available to an employee actively at work, whose position is abolished or who is displaced. ...
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> ... For the foregoing reasons the Arbitrator is satisfied that the terms of the collective agreement plainly contemplate the interpretation of the offer of early retirement separation allowances and incentives in the terms argued by the Company, namely that such incentives are not to be made available to employees other than those who are actively at work, whose retirement or attrition will directly benefit the process of mitigating adverse impacts of a material change.

In my view the Company's argument misconceives the principles underlying **CROA 2935.** A review of the full award in that case confirms that the employees there at issue were not individuals wrongfully removed from service by discipline or discharge imposed by the Company without just cause. **CROA 2935** concerned a claim by the union that certain individuals who were absent from active service by reason of their holding full-time union office or being on long-term disability leave should be entitled to the protections of a special agreement. It is, in my view, quite understandable that individuals so described would fall outside of the protections of a special agreement, the fundamental purpose of which is to minimize the adverse affects of a material change as they impact employees actively at work at the time of the change.

In the instant case, but for the Company's wrongful dismissal of Mr. Noel de Tilly, he would have been actively at work at the time of the Trois-Rivieres closure, and would have participated fully in the benefits of tile Trois-Riviees agreement. This is not, in the Arbitrator's view, a situation in which the Company can be said to be surprised or prejudiced in its planning for the closure, as it knew at the time the agreement was executed that the Council was contesting the discharge of Mr. Noel de Tilly, and was taking the position that he was entitled to be at work at all relevant dates, and should ultimately be made whole.

In my view the facts in the instant case fall squarely within the principle applied by this Office in CROA 2305. In that award Conductor J.M. Dick of London was reinstated into his employment following a disciplinary discharge, albeit without compensation. Nevertheless the Arbitrator directed that the grievor be entitled to participate in the benefits of a special agreement negotiated pursuant to the Goderich Exeter Subdivision sale. If anything, the circumstances of the instant case are more compelling, as the claim to reinstatement made by Mr. Noel de Tilly is fully vindicated. By adopting the outcome of CROA 3022 the parties are agreed that the Company was without any justification in removing the grievor from service when it did. I do not see upon what basis it can now assert that, through no fault of his own, he is to be disentitled from the benefits of Trois Rivi6res agreement merely because he was absent from

work by virtue of the Company's error in discharging him. To sustain the employer's position would be tantamount to confirming that it can profit from its own wrongdoing in a manner contrary to well established make whole principles.

In a different, but somewhat analogous case in CROA 2100 this Office found that an employee who was wrongfully discharged could not be deprived of disability benefits available to active employees. In that award the following appears:

> This award issues at the request of the parties in light of a misunderstanding which has arisen with respect to the grievor's entitlement to a weekly indemnity claim. By the award herein dated February 15, 1991 the Arbitrator effectively decided that a suspension should be substituted for the grievor's discharge. That is the consequence of the decision that she should be reinstated into her employment, without compensation or benefits for the period of her absence. In the result, the purported discharge of the grievor is null and void ab initio, and there has been no effective severance of her employment at any time. She is, therefore, not "re-employed" when she returns to work (or to the payroll list in the event that she is absent because of continued illness) as a result of the Arbitrator's reinstatement order. In the result, therefore, Ms. Belan must be considered to have continued uninterrupted in active service as an employee until such time as her medical condition would, in the normal course, have caused her to be absent from work, but for the fact that she had been discharged.
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> For the foregoing reasons the Arbitrator is satisfied that the grievor need not return to active duties as a condition to receiving the disability benefits which she would, but for her wrongful discharge, have received.
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> (emphasis added)

I am satisfied that the reasoning reflected in CROA 2100 and 2305 apply to the circumstances of Mr. Noel de Tilly. For the foregoing reasons the Arbitrator declares that the grievor is entitled to participate fully, and without qualification, in the benefits of the Trois-Rivieres agreement. With respect to the issue of wages to which the grievor might be entitled by reason of his reinstatement, the Arbitrator is also inclined to prefer the position advanced by the Council. The Company submits that in the calculation of the wages which Mr. Noel de Tilly would have earned, but for his removal from service, allowance must be made for the pattern of his previous availability, an availability which was substantially reduced by reason of his active involvement in Union matters. The Company's submission, however, fails to take into account an important qualification. The record reveals that as of March 7, 1997 when Mr. Noel de Tilly first learned that his maintenance of basic rate payments would be reduced as a result of any unavailability which he might incur to

conduct union business, he virtually ceased union activity, save for being unavailable for only two days prior to his removal from service on June 23, 1997. The Council submits, and the Arbitrator accepts, that armed with different knowledge as to his maintenance of earnings entitlement, Mr. Noel de Tilly did maintain and would have maintained a substantially higher degree of availability for service than had previously been the case.

While in the normal course this Office might be inclined to disregard an assertion based merely on conjecture, the claim at hand is not conjecture. The material before me reveals, in a very concrete fashion, that as of early March 1997 Mr. NoEl de Tilly consciously increased his availability for work once it became clear to him that unavailability by reason of Union activities would substantially reduce his wages. I am satisfied, on the balance of probabilities, that his availability would likewise have been increased had he not been removed from service from and after June 23, 1997. In the result, for the purposes of this dispute the Arbitrator concludes that the position of the Council is to be preferred, and that the formula of prior availability over a period of eighteen months applied by the Company is not responsive to the reality of the loss experienced by the grievor and the real availability for work which he would have provided, but for his wrongful removal from service. I make no further determination of detail at this time, save to indicate that it is obviously appropriate for the parties to have regard to a broader history of attendance at work by Mr. Nodl de Tilly, and his occasional unavailability for reasons other than union activity. If, for example, it can be shown that he sustained a particular rate of absence for reasons of illness or other personal circumstances in a relatively sustained fashion, such factors might properly be applied to the period for which compensation is being calculated. For the reasons related, however, it is unfair to estimate his availability based on a period of time in which he had heavy involvement in union activity. The matter is therefore referred back to the parties for final assessment, and may further be spoken to in the event of any disagreement between them.

Lastly I turn to the issue of mitigation. On the material before me I am compelled to conclude that there is some substance to the claim of the Company to the effect that Mr. Nodl de Tilly did not sufficiently mitigate his economic losses during the period he was held out of service. I am not, however, convinced by the formula for the reduction of compensation put forward by the Company, based as it is on general averages of earnings for persons in the Trois-Rivieres area, based on current 1999 figures, without any specific reference to the actual availability of jobs in that region at the relevant time.

In cases of this kind it is not uncommon for employers to tender in evidence newspaper advertisements and other data to show actual job openings within an employee's general area of experience and/or qualification, to support the inference that gainful employment was reasonably available to the individual at the time and place in question.

No such specific evidence is tendered in the case at hand. The Council's evidence is also wanting in some respects. It counters the Company's data respecting the number of employers in Trois Rivi6res, and average earnings, with the equally unsubstantiated assertion that the area was among the most economically depressed in Canada at the relevant time. Neither party's macro-economic approach is particularly helpful in a case such as this. General arbitral experience contemplates that an employee should come forward with evidence of a reasonably systematic job search through responses to newspaper advertisements and regular reference to job vacancies at government employment centres. In Carling O'Keefe Breweries and Western Union of Brewery Workers **(1984), 20** L.A.C. (3d) 67, Arbitrator Beattie expressed the principles as follows:

In my view, a dismissed employee, such as the grievor, must come before an arbitration board and establish that he has discharged the duty of taking such steps as a reasonable and prudent man would take in the circumstances, or to put it another way, the duty of taking reasonable steps to mitigate his loss. He must, in my opinion, be able to at least establish that he registered with his union (if applicable), Canada Manpower (now called Canada Employment Centre) and the Unemployment Insurance Commission, that he checked the employment board at the Canada Employment Centre on a reasonably regular basis, that he made inquiries of specific employers for whom he would be qualified to work and that he responded to any relevant newspaper advertisements. He would then be in a position to state to an arbitration board that there were not jobs available for him, based on his reasonable inquiry, and the onus would then shift to the employer to establish not only that jobs were available for which the employee was qualified but that the steps taken by the employee were not those which a reasonable and prudent person would take.

I cannot accept that a dismissed employee could remain idly by, or make minimal efforts at securing employment, and rationalize his lack of action on the basis of general economic conditions. The fact that there is a duty on a dismissed employee confirms to me that there is an evidentiary onus to be discharged by that employee. It strikes me as both unreasonable and unacceptable that a man who has lost his job, has submitted a grievance and must wait for a considerable period of time before learning the results of his grievance, should not make some effort, in his own interests, to secure employment which might very well prove to be preferable to him than the position from which he was dismissed.

Further, as noted above, employers commonly table in evidence specific material from documented sources to show that gainful employment was available. Unfortunately, I am left with little evidence of substance from either party on this issue in the case at hand.

There is, however, some evidence which I view as important. The grievor's own account of his efforts to secure employment does, as the Company submits, reflect an approach that is less than thorough and systematic. It appears that Mr. Noel de Tilly approached a handful of employers, most of

which he knew from some prior connection or association. He has not come forward with evidence of having scanned job advertisements in a systematic way over a substantial period of months, nor of having aggressively pursued the opportunities which might have been available to him through government employment offices. His only employment appears to have been a brief period of paid service to the Council. In my view, while no scientific precision can be brought to bear in this exercise, the facts must, to some extent, weigh against the grievor's claim for compensation. By the same token, given the fact that Mr. Noel de Tilly is relatively senior in age and limited in his working experience, some weight must also be given to the likelihood that those factors would have made it more difficult for him to find appropriate employment during the time in question. Bearing in mind that the grievor did make some efforts, and that he would in all likelihood have encountered some difficulty because of his age and background, I am not prepared to ascribe to his job search activities the same weight which the Company would urge. In my view it is appropriate to reduce his wage and benefit compensation claim by a rate of 20% in consideration of the evidence before me.

The matter is referred back to the parties for implementation in light of the above determinations. I retain jurisdiction in the event of any further dispute relating to the interpretation or implementation of this award.

March 15, 1999

MICHEL G. PICHER
ARBITRATOR