CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3071
Heard in Montreal, Tuesday, 12 October 1999
concerning
CANADIAN PACIFIC RAILWAY COMPANY
and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE

DISPUTE:

Claim on behalf of Mr. Philip Burke.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor was denied employment security (ES) benefits on the basis that he possessed only 90 months of cumulative compensated service (CCS). The Company takes the position that because the grievor did not, at the material time, possess 96 months of CCS that he was not entitled to ES. The Company also takes the position that because the grievor never held a permanent position with the Company he is not entitled to ES. The Brotherhood disagrees.

The Union contends that (1.) the Job Security Agreement PSA) does not require an employee to possess 96 months of CCS to be eligible for ES. Rather, article 7.1 of the JSA requires that an employee possess 8 years of CCS in order to be so eligible; (2.) Definition (g)(ii) of the JSA states that six or more months of CCS "shall be counted as a year of credit". On this basis, the grievor did in fact possess 8 years of CCS as defined by the JSA. (3.) In CROA 2720, the CROA arbitrator ruled that Company employees *who* are members of the BMWE and *who* hold temporary positions are not entitled to ES. However, that decision of the Arbitrator was quashed by the Quebec Superior Court on March 12, 1997.

The Union requests that it be declared that the grievor is entitled to ES, and that it be ordered that he be fully compensated for all ES benefits, and any other wages or expenses, lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:
(SGD.) **J. J. KRUK**
SYSTEM FEDERATION GENERAL CHAIRMAN
There appeared on behalf of the Company:

D. Freeborn	- Labour Relations Officer, Calgary
E. J. MacIsaac	- Labour Relations Officer, Calgary
R. M. Andrews	- Manager, Labour Relations, Calgary
D. T. Cooke	- Manager, Labour Relations, Calgary
S. J. Samosinski	- Director, Labour Relations, Calgary
G. D. Wilson	- Counsel, Calgary

And on behalf of the Brotherhood:

J. J. Kruk	- System Federation General Chairman, Ottawa
D. J. McCracken	- Federation General Chairman, Ottawa
D. W. Brown	- General Counsel, Ottawa
P. Davidson	- Counsel, Ottawa
G. D. Housch	- Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The sole issue in this dispute is whether, as the Company contends, an employee is required to have completed 96 months of cumulative compensated service (CCS) to be eligible for employment security. The position of the Brotherhood is that that grievor, Mr. Phillip Burke, is eligible for employment security protection even though his total CCS is 90 months. Its position is based on its view of the application of definition article (g)(ii) of the Job Security Agreement (JSA), which would count a period of 6 months or more as a year of credit for the purposes of computing CCS. By the application of that formula, the Brotherhood argues that Mr. Burke would have eight years of CCS, which it maintains would qualify him for the benefit of employment security.

The entitlement to employment security is defined in article 7.1 of the JSA which reads as follows:

> 7.1 Except as provided in Article 7A, subject to the provisions of this Article and in the application of Article 8.1 of this Agreement, an employee will have Employment Security (ES) when he has completed 8 years of Cumulative Compensated Service (CCS) with the Company. An employee on laid-off status on July 9, 1985 will not be entitled to ES under the provisions of this Agreement until recalled to service.

Cumulative compensated service is defined in the definition section of the JSA which provides, in part, as follows:

> (H) Twelve months of cumulative compensated service shall constitute one year of cumulative compensated service. For partial year credit, six or more months of cumulative compensated service shall be considered "as the major portion thereof" and shall be counted as a year of credit. Service of less than six months of cumulative compensated service shall not be included in the computation.

The concept of cumulative compensated service also applies to other aspects of the Job Security Agreement. Notably, it is a qualifying condition for SUB entitlement as reflected in the provisions of the Job Security Agreement relating to layoff benefits. In that regard article 4.3(a) provides as follows:

> 4.3(a) For each year of Cumulative Compensated Service (or major portion thereop an employee will be allowed a gross layoff benefit credit of five weeks for each such year. This will be calculated from

the last date of entry into the Company's service as a new employee.

The Company submits that there has consistently been a historical distinction between the calculation of cumulative compensated service for the purposes of ES entitlement on the one hand, and the calculation of cumulative compensated service for the purposes of SUB entitlement, on the other. It stresses that the layoff benefit of SUB entitlement, which pre-dates the advent of ES which was first introduced into the collective agreement in 1985, makes specific reference in the parenthetical portion to an employee being credited for a "major portion thereof" in calculating the individual's cumulative compensated service for layoff benefit purposes. It stresses that there is no similar language to be found in article 7. 1, which governs the entitlement to ES. On the contrary, it stresses that the language of that provision, which confers a far greater benefit, requires that an employee have "completed eight years of cumulative compensated service (CCS) with the Company" with no added proviso of "or major portion thereof". The Company maintains that that distinction has been universally recognized in the application of employment security provisions which apply to all non-operating unions, including the Brotherhood, from its inception.

From a strict interpretation point of view the Arbitrator has considerable difficulty with the position advanced by the Brotherhood. It is true, as the Brotherhood asserts, that paragraph (ii) of definition article (g) in the JSA addresses the concept of partial year credit for the purposes of cumulative compensated service. It does so, however, solely for the purpose of giving content to the phrase "the major portion thereof" such as it appears within the JSA. As noted above, that phrase does appear within the text of article 4.3(a) which relates exclusively to SUB entitlement. In interpreting and applying that article the reader is referred back to the definition section article (g)(ii) to determine what constitutes a "major portion" of a year of cumulative compensated service for the purposes of calculating SUB entitlement.

On the other hand, article 7.1, which governs the entitlement to employment security, makes no reference to an employee being given a partial year credit for ES purposes. In contrast to article 4.3(a), nowhere within that article does the phrase "the major portion thereof' appear. In the Arbitrator's view the language of definition article (g)(ii), read in the context of both article 4.3(a) and article 7.1, clearly lends greater support to the interpretation advanced by the Company. Obviously, where the JSA makes reference to an employee being credited a year of CCS on the basis of having worked the "major portion thereof", the six month threshold for partial year credit defined in sub-paragraph (ii) comes into play. It does not, however, come into play in respect of article 7, which relates to employment security, as no "ma or portion thereof" provision can there be found. Nor can the Arbitrator find anything persuasive in the Brotherhood's reliance on the decision of the Arbitrator which interpreted these same provisions in **Ad Hoc Case 267,** a grievance between the Canadian Signal and Communications Union and CN

Rail. While the job security language considered in that award is identical to that in the instant case, the dispute there at hand solely concerned the application of the partial year credit formula for the purposes of computing layoff benefits. It did not concern employment security entitlement. For all of the foregoing reasons, on a strict interpretation basis, the Arbitrator would be compelled to dismiss the grievance.

Alternatively, if it were found that the language of the JSA is ambiguous, so as to justify recourse to extrinsic evidence, the grievance must also fail. The submission of the Company is clearly supported by letters from representatives of two other non-operating unions who were privy to the negotiation and administration of the articles of the JSA here under consideration when they applied as a single agreement to all of the non-operating unions, including the Brotherhood. They confirm that the interpretation now advanced by the Company was consistently applied from the inception of the concept of employment security. That correspondence reflects that a fully ninety-six months of completed CCS has always been required to achieve employment security eligibility. As the language in question has continued without material change into the present JSA, which applies only to the Brotherhood, there is no basis upon which to conclude that the parties have ever agreed to an amendment or a change in its meaning.

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

October 19, 1999

MICHEL G. PICHER
ARBITRATOR