CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3078
Heard in Montreal, Wednesday, 15 December 1999
concerning
ST. **LAWRENCE & HUDSON RAILWAY COMPANY**
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)
EX PARTE

DISPUTE:

The issue in dispute involves the level of compensation afforded Mr. R. Montmarquette of Kamloops, B.C. under the memorandum of agreement dated September 30, 1997 involving the cessation of operations on the Lachute, Trois Rivi6res and Prescott Subdivisions.

EX PARTE STATEMENT OF ISSUE:

Mr. Montmarquette relocated to British *Columbia in* November 1997 under the terms of the memorandum of agreement dated September 30, 1997.

On March 4, 1999 Mr. Montmarquette was advised by way of a letter requesting his concurrence as follows:

> Your layoff benefit, during the period of your entitlement to El benefits, should have been calculated at 80% of your basic weeldy rate of pay which, according to the material change agreement (1/52 of your *previous annual* earnings) was $1,270.43 and 80% of that amount is 1,016.34. Consequently, you should have received 1,016.34 per week during the period of your EI entitlement, made up of $413 from El and $604.34 top-up from the company. We calculate that *your* top-up was short paid by an amount of $75.07 per week for 38 weeks, the period of your EI entitlement.

The Union contests the figure of $1,270.43 as the base figure to calculate SUB benefits. This figure does not correspond to Mr. Montmarquette's incumbency figure $1,463.14, which was calculated at the time the material change took affect. Accordingly, 80% of his basic weekly pay would entitle him to a SUB benefit of $1,170.51.

The Union requests that Mr. Montmarquette be compensated the $8,711.12 for the periods in which he was short paid on SUB benefits. He be compensated while in working service with an incumbency of $1,463.14. Additionally, while on lay off he be compensated 80 percent of his basic weekly pay even when he is no longer entitled to EI.

The Company has declined the Union's request.

FOR THE COUNCIL:
(SCID.) D. A. WARREN

GENERAL CHAIRPERSON

There appeared on behalf of the Company

J. Dragani - Labour Relations Officer,
G. Chehowy - Manager, Labour Relations
D. David - Consultant

And on behalf of the Council;

D. A. Warren - General Chairperson

AWARD OF THE ARBITRATOR

This grievance concerns the layoff benefits paid to Mr. R. Montmarquette when laid off at Kamloops, British Columbia.

It is common ground that Mr. Montmarquette was an employee adversely affected by the closure of the Trois Rivieres Terminal. As such he has rights under the memorandum of agreement negotiated in relation to the closure of operations of the Lachute, Trois Rivieres, and Prescott Subdivisions, dated September 30, 1997. Mr. Montmarquette was given the extraordinary opportunity of relocating to another seniority district, an option which he took up, which resulted in his move to British Columbia. Unfortunately, a downturn in the Company's volume of business in Western Canada resulted in his layoff, given his more relatively junior position in his new seniority district.

At the root of the dispute is the grievor's claim for layoff benefits on the occasion of his layoff at Kamloops, under the terms of the memorandum of agreement. There are two aspects related to that dispute: firstly the calculation of the grievor's basic weekly pay for the purposes of the memorandum of agreement and, secondly, his entitlement to layoff benefits following the exhaustion of his Employment Insurance (formerly Unemployment Insurance) benefits under the terms of article 4.3 of the memorandum of agreement. The grievor's claim that he was misled with respect to his entitlements prior to his decision to move to British Columbia must also be considered,

On the basis of the material before me there appears to be little dispute that there was in fact a mistake in the initial calculation of the grievor's basic weekly pay. That calculation, made at first instance by Mr, Ross A. McIntosh, mistakenly placed the grievor's basic weekly rate at $1,463.14. It appears that that average was arrived at in error, as Mr. McIntosh mistakenly included in his calculation of wages the grievor's receipt of a lump sum of $30,000 for relocation allowance, apparently pursuant to the terms of article 11.4(c) of the memorandum of agreement. It is common ground that such a sum should not be included in the calculation of any employee's wages for the calculation of his or her basic weekly pay, The Arbitrator is satisfied, based on the figures tabled at the arbitration hearing, that the grievor's correct basic weekly rate is as calculated by the Company, a figure which it relates to be $1,270, rather than the $1,463.14 claimed by Mr. Montmarquette. That figure is correctly arrived at by surveying pay periods between November 1, 1996 and

November 13, 1997, and excluding periods for which he was off sick and had either no earnings or insufficient earnings for the purposes of calculation. The grievor's total earnings for the remaining eighteen pay periods in question total $45,452.20 which yields a BWR of $1,262-.50. On that basis the Arbitrator is satisfied that the basic weekly rate of $1,270 attributed to the grievor by the Company is properly in accordance with the memorandum of agreement,

In dealing with this aspect of the case it is, of course, unfortunate that Mr. Montmarquette may have been to some degree misled by the calculations of Mr. McIntosh. It is not entirely clear, however, to what extent those calculations may have truly made a substantial difference in the grievor's decision with respect to his move to British Columbia. The erroneous &clarification" of Mr. Montrnarquette's entitlement was apparently communicated to him by Mr. McIntosh in a written note sent in January of 1999. Additionally, letters to *him from* the Company's payroll administration in Calgary, erroneously reflecting his basic weekly rate as $1,463,14 were sent in July and August of 1999. There is no documentation before the Arbitrator to confirm that the grievor's BWR was erroneously communicated to him at the time of his election to move to British Columbia, As the Company notes, it appears highly doubtful that such an exercise would have been done for him at the time of the closure of Trois Rivieres, as he was on sick leave at the time the Council and Company identified affected employees for whom MBR calculations needed to be made, on September 30, 1997. It is also doubtful that Mr. McIntosh would have erroneously included the $30,000 lump sum for moving allowance unless the calculation was made after the grievor's receipt of that sum, which would be after his decision to move. As the Company points out, the need to calculate the grievor's basic weekly pay would not have arisen until his actual layoff at Kamloops on or about December 28, 1997.

On the documentation before the Arbitrator, it would appear that the grievor made his move to British Columbia before there was in fact any need to calculate his basic weekly pay. It also appears that there was a shortfall in the payment to the grievor of top-up monies to which he was properly entitled over a thirty-eight week period that he received unemployment insurance benefits. That was in fact corrected by a payment to the grievor of a cheque of $2,852.66 by the Company. On the whole, therefore, the Arbitrator cannot find that there was detrimental reliance on the part of Mr. Montmarquette, or that the Company incorrectly calculated his rate of basic weekly pay for the purposes of the memorandum of agreement concerning the cessation of railway operations on the Lachute, Trois Rivi8res and Prescott Subdivisions.

I turn to consider the second issue in dispute. The Council claims that under the provisions of article 4,3(b) of the memorandum of agreement Mr, Montmarquette was improperly denied a wage top-up, over and above the ma)dmum El weekly benefit, after his El entitlement was exhausted. The article in question reads as follows:

> 4.3 An eligible employee, as defined in Appendix "A", may at the expiration of the seven day waiting period specified in Appendix "A", make application to the designated Company Officer for a weekly lay-off benefit as follows:
>
> (a) A weekly lay-off benefit for each complete week of seven calendar days laid off, following the seven-day waiting period referred to in Clause 4.3, of an amount that, when added to the Unemployment Insurance benefits and/or outside earnings in excess of those allowable under UIC for such week, will result in the employee receiving 80 percent of his basic weekly pay at time of lay-off.
>
> *b) During* any week, following the seven-day waiting period referred to in Clause 4.3, that an eligible employee is not eligible for UIC benefits account eligibility for such benefits *having* been exhausted or account such employee not being insured for UIC benefits, or account UIC waiting period, such employee may claim a weekly layoff benefit for each complete week of seven calendar days laid off of the maximum UIC weekly benefit currently in force or such lesser amount that when added to the employee's outside earnings for such week will result in the employee receiving 80 percent of his basic weekly pay at the time of lay-off.
>
> (emphasis added)

The dispute is relatively simple. At a certain point in time Mr. Montmarquette exhausted his EI benefits while on layoff at Kamloops. According to his interpretation, under article 4.3(b) he remained nevertheless entitled to receive from the Company a payment equivalent to 80% of his basic weekly pay at the time of his layoff. Accepting that his basic weekly rate at the time was $1,270, as reflected above, 80% of that figure would, according to the Council's submission, have entitled Mr. Montmarquette to the payment of $1,016.34 as a weekly layoff benefit. In fact the Company paid the grievor an amount identical to his expired El benefit of $413 weekly.

An examination of the language of article 4.3(b) of the memorandum of agreement clearly supports the Company's interpretation. As is apparent from the wording of sub-paragraph (b), when a laid off employee's employment insurance entitlement is exhausted the individual has two options that he or she may claim: first, the employee can claim a weekly layoff benefit which is the equivalent of his or her maximum EI weekly benefit then in force; second, he or she may opt to receive a smaller amount than the maximum El weekly benefit, that smaller amount being a sum to be added to the employee's earnings from other employment, the sum total of which results in the employee receiving 80% of his or her basic weekly rate, In other words, under the second option, if an employee in the situation of the grievor, for whom 80% of basic weekly pay would total $1,016.34 was in fact *in* receipt of outside earnings of $800, he or she could opt to receive the "lesser amount" of $216.34 to top the employee up to 80% of his or her basic weekly pay.

So viewed, it is clear that the second option described *in* sub-paragraph (b) of article 4,3 of the memorandum of agreement does not place the Company under an obligation to pay an employee an amount which brings him or her into receipt of 80% of their basic weekly pay, entirely funded by the Company. Rather, it describes a minor top-up, by definition "lesser" than the maximum El weekly benefit, which is to be added to an employee's weekly outside earnings.

The material before the Arbitrator further demonstrates that the formula agreed to between the parties within the terms of article 4.3(b) of the memorandum of agreement is one of long standing in the industry. It appears that it was particularly common in special agreements negotiated in relation to non-operating employees. It has also found its way into special agreements negotiated with the Council in relation to running trades employees as, for example, in the memorandum of agreement relating to the lease of trackage of the Trans-Ontario Railway Company, a matter dealt with in an award of this arbitrator dated October 24, 1996 (AH 434).

What the Council seeks to obtain from its interpretation of article 4.3(b) of the memorandum of agreement is in fact the greater protection of the lay off benefits separately negotiated as part of the Conductor-Only Agreement. That agreement, now incorporated as article 9A(7)(4)(b)(ii) of the collective agreement, specifically provides for continued coverage in the form of a top-up of 85% to 90% of an employee's basic weekly pay, after the expiry of his or her EI benefits. That is achieved by the following language:

> (b)(H) During any week following the seven day waiting period referred to in this paragraph (b) that an eligible employee is not eligible for UI benefits account eligibility for such benefits having been exhausted, or account such employee not being insured for UI benefits, or account UI waiting period, such employee may claim a weeldy lay-off benefit for each complete week of seven calendar days laid off that when added to the employee's outside eamings for such week will result in the employee receiving the percentage of his basic weekly pay at the time of lay-off as specified in Clause 7.4(a) above.

In fairness to the Council, and to Mr. Montmarquette, this is a dispute of first impression, apparently because there has never before been a circumstance in which a running trades employee with layoff benefits under a special agreement has in fact exhausted their employment insurance benefits, a*s is the case* with Mr. Montmarquette. There does not appear to be any dispute, however, that as among non-operating employees the identical language of article 4.3(b) of the memorandum of agreement has consistently been interpreted and applied as the Company has done in the case of the grievor. It may also be added that Mr. Montmarquette is not without other options. As noted at the arbitration hearing, he was offered opportunities to return to his original seniority district in Quebec,

where there is an apparent need for running trades employees and where his greater original seniority would bring lucrative work opportunities. For reasons best known to himself he declined those opportunities, even though at the hearing the Company again affirmed that if he wishes to return he has every right to do so, although it would now be at his own expense.

On the whole, for all of the reasons related above, the Arbitrator is satisfied that the grievance cannot succeed. Although the Company made an initial error in the calculation of the grievor's basic weekly pay, it is correct in its present determination of that figure. Additionally, the grievor cannot claim entitlement to monies beyond the equivalent of his maximum El weekly benefit following the exhaustion of his El benefits, for the purposes of article 4.3(b) of the memorandum of agreement. Lastly, for the reasons noted above, the Arbitrator cannot find that the grievor was induced into financial hardship by the Company's erroneous calculations, apparently made only after he moved to British Columbia and was faced with a layoff. The grievance is therefore dismissed.

December 17, 1999

MICHEL G. PICHER
ARBITRATOR