CANADIAN RAILWAY OFFICE OF ARBITRATION

2ND SUPPLEMENTARY AWARD TO

CASE NO. 3040

Heard in Montreal, Thursday, 14 February, 2002
concerning
CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

EX PARTE

There appeared on behalf of the Company:

D. Guérin	– Labour Relations Officer, Calgary
A. Regimbauld	– Assistant Manager, Operations, Montreal
S. Seeney	– Manager, Labour Relations, Calgary

And on behalf of the Council:

D. Généreux	– Vice-General Chairman, Montreal
M. Gignac	– Chairman – Yard, Montreal
R. Duplantie	– Claimant

2ND SUPPLEMENTARY AWARD OF THE ARBITRATOR

The Council claims that three employees employed at Montreal, including the outpost terminal of Rigaud, are entitled to maintenance of basic rates protection (MBR) under the terms of the Trois Rivières closure agreement, a memorandum of agreement dated September 30, 1997. It asserts that the employees in question, Conductor Bill Penning, Conductor Réjean Duplantie, and Brakeman Martin Gignac were adversely affected by the impact of the return to work of the grievor in this matter, Mr. Jean Noel deTilly, as a result of the decision of this Office in **CROA 3040**. In an earlier award herein, dated March 15, 1999 it was determined that Mr. Noel deTilly was entitled to the full protections of the Trois Rivières closure agreement.

The Company questions whether there has been any adverse effect upon any of the three employees on whose behalf the claims for MBR are now made. It asserts, among other things, that there may have been little effect upon them to the extent that there was some attrition in the workplace, by reason of the decease of one employee and the discharge of another, apparently sustained at arbitration. While the Arbitrator accepts the general principle that attrition can have a mitigating effect which offsets adverse impacts for the purposes of a TO&O change (**SHP 345**) it is not clear that those principles apply foursquare in the case at hand. At the hearing it emerged that the positions which became vacant by reason of attrition were in fact filled before the return to the workplace of Mr. Noel deTilly. It is not clear, in these circumstances, that the removal of two employees from the workplace can therefore be said to have had a cushioning effect with respect to the adverse effects on the employees who are claimants in this matter.

There is, however, evidence with respect to each of them which would suggest that the Company's position is correct. Mr. Penning was displaced by Mr. Noel deTilly upon his return to work as a conductor

on August 2, 1999. However, it is not disputed that Mr. Penning continued to hold work as a conductor in passenger service. There was, in other words, no adverse effect upon him and he cannot, therefore, claim entitlement to any protection under the memorandum of agreement.

The circumstances of Mr. Réjean Duplantie are somewhat different. He was displaced by Mr. Penning as a conductor on August 16, 1999. At that point he was employed at Rigaud, an outpost terminal to Montreal. He could then have held work as a conductor in Montreal. He elected, instead, to occupy a position of brakeman in passenger service out of Rigaud. While it is true that he may have suffered a reduction in earnings, it is as a result of his own choice not to protect in the highest classification for which he is qualified. By reason of his own decision, he has taken himself out of the protections of the basic rate benefit within the memorandum of agreement by failing to exercise seniority to the highest rated position at his home terminal in accordance with seniority provisions, contrary to the requirements of article 3.4 of the memorandum of agreement. Mr. Duplantie cannot, therefore, in this circumstance claim the right to MBR protection.

There are also somewhat different circumstances in the case of Mr. Martin Gignac. It is common ground that Mr. Gignac was displaced by reason of the chain impact of the return to work of Mr. Noel deTilly. He was displaced from a regular brakeman's position in passenger service on September 27, 1999. It appears that he was in fact removed from that position on the first day which he effectively held it. In the Arbitrator's view that does not change his entitlement. In the result Mr. Gignac was displaced to the spareboard for brakemen in passenger service. The evidence before the Arbitrator confirms that the guarantee as a brakeman on the spareboard is of a lower amount than he would have enjoyed in his position as a regular assigned brakeman, and it also appears that he lost some opportunities for relief work as a conductor which might otherwise have been available to him.

The right to an MBR of Mr. Gignac would arise under the terms of article 3.1(b)(1)(ii) which provides that MBR protection is to be available to:

> **(ii)** An eligible brakeman who was regularly employed as such in passenger service on the day immediately preceding the date of the change and who, thereafter, as a consequence of the change is unable to hold a brakeman's position in passenger service.

The Company submits that the grievor, as a spareboard passenger brakeman, would not qualify as a person who has been rendered unable to hold a brakeman's position in passenger service. Although the matter at first seemed doubtful, upon careful consideration of the language of the agreement the Arbitrator is compelled to agree with the Company submission in that regard. Mr. Gignac did continue to hold a brakeman's position in passenger service, albeit on the spareboard. It would have been open to the parties to make it clear that an individual displaced from a regular position as a brakeman in passenger to a position on a brakeman's spareboard in passenger service would be deemed eligible for MBR protection. There is, however, no language in the rather extensive provisions of the memorandum of agreement that would encompass that situation. Further, regard to other parts of the language of the agreement would indicate that the parties intend the words "position" to apply to individuals on a spareboard. That is evident for example, when regard is had to the provisions governing a yardman who might be "… unable to hold a regular position on a spareboard". In light of the general usage of language in the agreement I am compelled to the conclusion that a person holding a position on the brakeman's spareboard in passenger service cannot be said to be "unable to hold a brakeman's position in passenger service" within the meaning of article 3.1(b)(1)(ii). In the result, I cannot find that there has been an adverse impact upon Mr. Gignac.

For all of the foregoing reasons the claim of the Council must be dismissed.

February 15, 2002

(signed) MICHEL G. PICHER
ARBITRATOR