

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3191

Heard in Calgary, Tuesday, 8 May 2001

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

DISPUTE:

Failure to advertise and award early retirement opportunities pursuant to Addendum 31 of Agreement 4.3 to R.L. Daunheimer and J.L. Koshey.

JOINT STATEMENT OF ISSUE:

In early 1998 Conductor R.L. Daunheimer and Conductor J.L. Koshey approached Assistant Superintendent James Edgar regarding the availability of early retirement opportunities pursuant to Addendum 31 of Agreement 4.3 for the terminal of Melville in Saskatchewan.

Assistant Superintendent Edgar made inquiries with the Crew Management Centre and Human Resources departments and advised Conductors Daunheimer and Koshey that no opportunities were available, nor would any be forthcoming.

Based on this information, J.L. Koshey retired effective August 31, 1998 and R.L. Daunheimer retired effective October 31, 1998 without benefit of the lump sum payment provided for in Addendum 31. The Company subsequently bulletined and awarded early retirement opportunities in Melville pursuant to Addendum 31.

The Union submits that the Company provided erroneous information to the grievors and has violated the collective agreement.

The Union requests that the grievor be awarded the lump sum payment in accordance with Addendum 31 of Agreement 4.3.

The Company contends that the grievors made a decision to voluntarily retire at a time when early retirement opportunities were not being offered and there is no reason to provide them with this benefit..

The parties agree that this issue is properly before the Arbitrator.

FOR THE COUNCIL: FOR THE COMPANY:
(SGD.) R. A. HACKL (SGD.) D. VAN CAUWENBERGH
FOR: GENERAL CHAIRPERSON FOR: ASSISTANT VICE-PRESIDENT, LABOUR
RELATIONS

There appeared on behalf of the Company (among others):
D. Van Cauwenbergh – Human Resources Associate, Winnipeg
And on behalf of the Council (among others):
M. G. Church – Counsel, Toronto
R. A. Hackl – Vice-General Chairman, Edmonton

At the request of the parties, the Arbitrator adjourned the hearing sine die.

At a conference call held on Tuesday, 9 October 2001, there appeared on behalf of the Company
D. Van Cauwenbergh – Human Resources Associate, Winnipeg
J. McKenzie – Witness
S. Blackmore – Labour Relations Officer, Edmonton
B. G. Crompt – Witness
And on behalf of the Council
R. A. Hackl – Vice-General Chairman, Edmonton
J. Edgar – Assistant Superintendent, Melville
M. Rutzki – Local Chairperson, Melville
J. L. Koshey – Grievor
R. L. Daunheimer – Grievor

AWARD OF THE ARBITRATOR

It is common ground that prior to their retirement, sometime in early 1998, grievors Koshey and Daunheimer approached Company representatives, including Melville, Saskatchewan Assistant Superintendent James Edgar to inquire as to the possible availability of early retirement opportunities under Addendum 31 of Agreement 4.3, also known as the Conductor-Only Agreement. The testimony of Mr. Edgar, supported by the evidence of both grievors, is that upon being approached by the grievors he made inquiries as to whether any early retirement opportunities remained available for application in Melville, Saskatchewan. According to his recollection, on the occasion of Mr. Koshey's visit to him, he called the then Manager of Pay Systems, Mr. Wayne Homer, to determine the status of conductor-only early retirement opportunities in Melville. He relates that Mr. Homer advised him that the five year period established under the Conductor-Only Agreement had expired and that there would not be any more early retirement opportunities available under Addendum 31 of the collective agreement for employees at Melville.

It is not disputed that on the strength of that information both grievors opted for "normal" early retirement as was their right under the collective agreement. That is to say they did so without the additional financial benefit and incentive of the conductor-only early retirement option. Mr. Koshey then retired effective August 31, 1998 and Mr. Daunheimer did so effective October 31, 1999.

While there appears to be some disagreement in the recollection of the parties as to what the Company's position was at the time, the documentary evidence before the Arbitrator tends to support the position of the Council, that the Company was in error with respect to its understanding of the operation of Addendum 31. It now does not appear disputed that although the five year period of the Conductor-Only Agreement had expired, there did remain some unused early retirement credits at Melville, credits which could become available for use in the future in the event that the Melville terminal might come to have surplus positions. That is, in fact, what subsequently transpired. On March 8, 1999 the Company issued a notice of early retirement opportunities in Western Canada, including five such opportunities at Melville. The evidence of both grievors is to the effect that if they had not been led to believe that all such opportunities at Melville had been exhausted, they would not have taken early retirement without the additional benefit of the conductor-only incentives, and would have continued in employment into the spring of the following year, when the opportunities were in fact posted.

Such evidence as there is with respect to the understanding of the Company, and the nature of its representations to employees, including the grievors, with respect to conductor-only early retirement opportunities is reflected in a letter which the Company provided to another employee who had made a similar inquiry. On January 23, 1998 the Manager, Pay Systems, Mr. B.G. Crompt, who it appears had recently relieved Mr. Homer of his duties, addressed the following letter to employee G. Jobert with respect to his application for early retirement under the Conductor-Only Agreement:

Dear Gerald;

Reference your letter dated January 20th, 1998 applying for early retirement under the provision of Addendum 31 of Agreement 4.3 (referred to as Appendix #2 of the Conductor Only Memorandum in your letter). The provisions provide for early retirement opportunities being made available to protected freight employees with a minimum of 110 opportunities which will be made available to the seniority territory over a 5 calendar year period or until exhausted. As this guarantee is now exhausted the Company is no longer obligated to offer retirement opportunities under the terms of that agreement.

Yours Truly,

(signed) B. G. Crompt
Manager, Pay Systems

Mr. Crompt's testimony suggests that his response to Mr. Jobber was intended to address only the first five year period, during which early retirement opportunities could be requested as of right, regardless of whether there was a surplus of employees at a given terminal. The Arbitrator has some difficulty with that evidence, given the express content of the letter provided to Mr. Jobber. A reading of Mr. Crompt's response to Mr. Jobber confirms that the seniority territory was entitled to a total of 110 opportunities. Those opportunities could be taken during the five calendar year period, or afterwards to the extent that they might not be exhausted. However, Mr. Crompt's letter to Mr. Jobber is categorical in its conclusion: "As this guarantee is now exhausted the Company is no longer obligated to offer retirement opportunities under the terms of that agreement." That, it now appears agreed, is not a correct statement of the state of early retirement opportunities under the Conductor-Only Agreement as of January, 1998, even though the five year period expired in May of 1997. By any reading, Mr. Crompt's note reflects an understanding of the Company's managers to the effect that the conductor-only early retirement opportunities for the seniority territory had been fully and entirely exhausted, and that that none would be available in the future.

That message is entirely consistent with the testimony of Assistant Superintendent Edgar, as regards the advice that was given to him when he inquired on behalf of Mr. Koshey. As noted above, in fact it proved incorrect, and following Mr. Koshey's decision to retire, the more lucrative retirement opportunities under the Conductor-Only Agreement were in fact made available at Melville. Both employees, who are not senior in years, testified that they would not have retired as early as they did, had they known that conductor-only early retirement opportunities would have been available to them in the future at Melville. It does not appear disputed that their seniority would have merited them entitlement to those enhanced early retirement opportunities had they remained in employment into March of the following year.

The Council suggests that in these circumstances the Company failed in its fiduciary obligation to the grievors, in that it provided wrong information to them, information on the strength of which they altered their position by electing for early retirement without the enhanced value of a conductor-only early retirement opportunity. In the Arbitrator's view the instant case does not require a finding to confirm or reject the submission that a fiduciary obligation existed. For the purpose of the instant case it is, in my view, sufficient to find that as of the date at which they sought the information from Assistant Superintendent Edgar the grievors were employees entitled to the benefit of conductor-only early retirement opportunities should any become available. As the administrator of the agreement, the Company did have an implied contractual obligation to provide them correct information in respect of the current status of the quota of retirement opportunities at Melville. Its failure to do so is, in my view, a violation of what must be taken to be a clearly implied obligation of the Company under the terms of the collective agreement. As a result of that violation the grievors were in fact deprived of an important retirement benefit which, I am fully satisfied, they would otherwise have awaited by delaying their retirement. In that circumstance they are entitled to a contractual remedy which will make them whole.

The grievance is therefore allowed. The Arbitrator directs that the Company pay forthwith to the grievors all benefits and entitlements, monetary and otherwise, which would have been theirs had they been allowed the opportunity to continue their employment so as to retain their eligibility to claim as yet unused conductor-only early retirement opportunities at Melville. Should the parties be unable to agree on the form or quantum of compensation the matter may be spoken to.

October 12, 2001 (signed) MICHEL G. PICHER
ARBITRATOR