CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3276

Heard in Montreal, Tuesday, 10 September 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. Ken Jones (#10-942).

EX PARTE STATEMENT OF ISSUE:

By way of letter dated July 10, 2002, the grievor was advised by the Company that he was required to accept a permanent engine attendant position in the CAW bargaining unit in Golden, B.C. At the time, the grievor was an employment security (ES) status employee who had been affected by the sale of the E&N Railway to Rail America in 1998. The grievor worked for Rail America until he was laid off earlier in 2002. Subsequently, the grievor was, subject to article 7.5 of the Job Security Agreement (JSA), successful in locating employment outside of the Company. He started working for his employer on July 2, 2002. Notwithstanding the fact that the Company only notified the grievor of the job in Golden by way of letter dated July 10, 2002, it took the position that if the grievor did not report to Golden he would forfeit ES. A grievance was filed.

The Union contends that: **(1)** The grievor received no proper notice of recall prior to commencing work for the outside employer; **(2)** Article 7.5(c) of the JSA provides that an employee accepting employment outside of the Company shall be subject to recall only to permanent positions of his BST; **(3)** The Company's actions are in violation of article 7.5 of the JSA in general and article 7.5(c) thereof in particular.

The Union requests that the Company be ordered to rescind immediately its decision to force the grievor to accept a position at Golden. The Brotherhood also requests that the Company be ordered to compensate the grievor for all wages and benefits lost and expenses incurred as a result of this matter. These expense include, but not to be limited to, penalty overtime for all travel between Nanaimo and Golden, the premium auto allowance rate for all travel between Nanaimo and Golden, the $35.00 per diem meal allowance for every day worked in Golden and for days travelling to and from Golden, and all hotel expenses incurred as a result of travel between Nanaimo and Golden.

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:

E. J. MacIsaac	– Manager, Labour Relations, Calgary
S. Samozinski	– Director, Labour Relations, Calgary
R. V. Hampel	– Labour Relations Officer, Calgary
A. Damji	– Labour Relations Officer, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. W. Brown	– General Counsel, Ottawa
R. Achim	– BMWE ESF Plan Administrator,

AWARD OF THE ARBITRATOR

The record confirms that the grievor, Mr. Ken Jones, was an ES status employee by reason of the closure of the Company's business on Vancouver Island, and the transfer of the E&N Railway to Rail America. He worked for Rail America until the cessation of its operations in the commencement of 2002. As a result, he was unemployed and in receipt of full ES benefits from January through June of 2002.

On June 26, 2002, when Mr. Jones was unemployed, he received a telephone call from the ES Fund Administrator, Mr. Raymond Achim. Mr. Achim then indicated to Mr. Jones that he would in all likelihood be obliged to take a newly established

engine attendant's job in the CAW bargaining unit in Golden, British Columbia. Mr. Achim advised the grievor that he could not confirm his obligation as a final matter as he was still awaiting replies from other employees being canvassed to fill the job. It is common ground that the job was to be filled on a "senior may – junior must" basis in keeping with the provisions of the Job Security Agreement.

It is common ground that if Mr. Jones held a position of outside employment at his original location, with his salary being topped up by ES payments, he could not be compelled to move to work in a position in another bargaining unit, and in another Basic Seniority Territory. In that regard the Brotherhood draws to the Arbitrator's attention the provisions of article 7.5 of the Job Security Agreement which stipulates, in part, that employees who accept permanent outside employment are subject to recall "… for permanent vacancies on [their] former BST." Mr. Jones' former BST is Vancouver Island.

Following his conversation with Mr. Achim the grievor promptly found outside employment as a caretaker with a property management company. His wages in that employment would have involved an E.S. top up of $10.00 per hour over and above his basic salary of $9.00. His first day of work with his new employer, Complete Residential Property Management Corporation, was July 2, 2002. The Brotherhood submits that when the Company provided the grievor a written call to work at Golden, BC, by way of a letter on July 10, 2002, the grievor was entitled to the protection of article 7.5 of the JSA, and could not be forced to move to Golden, BC. It is common ground that he did so, however, subject to the determination at arbitration of this grievance.

The Company asserts a substantially different view. It stresses that at the time he was contacted by Mr. Achim the grievor did not hold outside employment. In that circumstance the Company maintains that under the obligations of the JSA, and in particular article 7.3(b) of the JSA, he was required to fill a permanent vacancy in another bargaining unit, which in the case at hand included one of three engine attendant positions available at Golden, BC in the bargaining unit of the Canadian Auto Workers.

Article 7.3(b) of the JSA reads as follows:

> **7.3 (b)** An employee who has ES under the provisions of this article and is unable to hold a position in

> accordance with article 7.3(a) shall be required to exercise the following options provided the employee is qualified or can be qualified in a reasonable period of time to fill the position involved. In filling vacancies, an employee who has ES must exhaust such available options, initially on a local basis, then on his or her basic seniority territory, then on the Region.
>
> > **(1)** fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit.
> >
> > **(2)** there being none, fill an unfilled permanent vacancy in a position which is not covered by a collective agreement.

It is not disputed that in the case at hand the grievor was unable to hold a position in accordance with article 7.3(a) of the JSA.

Much of the instant dispute turns on the status of the grievor on June 26, 2002 and his status when he received a written notice of assignment from the Company on or about July 10, 2002. The Brotherhood asserts that July 10 is the operative date for determining the grievor's status under the JSA, and that at that time he did have outside employment, and was therefore not compellable to fill an permanent vacancy in another bargaining unit. The Brotherhood submits that he could only be compelled to fill a permanent vacancy in his former BST, which is Vancouver Island, by reason of the protections of article 7.5(c) of the JSA. As it is not disputed that the Company no longer has any operations on Vancouver Island, the consequence would be that the grievor would be entitled to a top up of his wages in outside employment on Vancouver Island for an indefinite period, possibly until retirement.

If, on the other hand, the controlling date is June 26, 2002, it does not appear disputed that the grievor could not invoke the protections of article 7.5(c) of the JSA, as he was then without any outside employment. The Company questions the grievor's motives, noting that he had been without outside work for a period of some six months prior to receiving the telephone call from Mr. Achim, and stressing that within a short period thereafter, according to its uncontradicted representations, he found several job opportunities without apparent difficulty. The suggestion implicit in the Company's submission is that the grievor manipulated his circumstances in an attempt to frustrate

the Job Security Agreement by effectively making himself unavailable to fill a permanent vacancy within the Company. If successful, his actions would have forced the employer to hire off the street to fill that position while substantially topping up the grievor's wages as a property caretaker on Vancouver Island.

Part of the Brotherhood's submission is that the grievor should have been recalled under the terms of article 15.7 of the collective agreement and, in any event, the notice sent to him dated July 10, 2002 could have no effect as he had resumed outside employment by that date.

The Arbitrator cannot agree with the Brotherhood's characterization of the facts and its interpretation of the parties' obligations in the circumstances disclosed. It should be noted that the Company's written notice to Mr. Jones, dated July 10, 2002, expressly indicated that he was being required to "fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit in accordance with article 7.3(b) of the BMWE Job Security Agreement (JSA)". I accept the submission of the Company that at all material times, as an employee on ES benefits, the grievor was not laid off and was not subject to recall under the provisions of article 15.7 of the collective agreement. He was, as is well established in the jurisprudence, an employee who was liable to be called to perform work as and when he might be needed, subject only to the limitations of the JSA, including article 7.5(c) which the Brotherhood submits applied in the circumstances (*see* **CROA 2535**).

In the Arbitrator's view the point at which the grievor's obligation crystallized was when he was first advised of the vacancy to which he was liable to be assigned. That is the moment in time at which he was properly contacted by the ES Fund Administrator, Mr. Achim, on June 26, 2002. As reflected in article 7.6(d) of Appendix E of the JSA, the duties of the administrator include the following:

> **(b)** Liaise with relevant Parties, including the appropriate payroll personnel of the Employer and affected ES Eligible employees.

The grievor was in receipt of full ES benefits, without any employment, on June 26, 2002 when he was contacted by Mr. Achim. He was then advised that vacancies were in the process of being filled at Golden, BC within the bargaining unit of the CAW, and that he was liable to be compelled, as a junior employee, to

fill one of them if the normal canvass of CAW bargaining unit ES recipients did not produce incumbent employees to do so. For reasons touched upon in prior awards, the operation of the JSA obviously involves a certain amount of administrative notices and the canvassing of employees before an individual's ultimate obligation to protect work is finalized. The general scheme of the JSA reflects the parties' understanding that it is preferable for an ES status employee to perform productive work for the Company, and that work with an outside employer is a last option, providing an alternative means of reducing the employer's ES burden. Given that the administration of the JSA obviously requires a period of time before the individuals who will be compelled to fill a permanent vacancy are identified, it is counterintuitive to conclude that employees who are subject to such assignment can, during the shakeout period, withdraw themselves from their obligations by unilaterally obtaining outside employment.

The Arbitrator is satisfied that in the case at hand it is the status of Mr. Jones as of June 26, 2002 which must govern. That is the date he was notified by Mr. Achim that vacancies existed to be filled at Golden, BC and that in all probability he would be compelled, as a junior employee, to fill one of them, failing which he would be liable to lose his ES protection. In the circumstances, therefore, Mr. Jones was not in a position to invoke the terms of article 7.5(c) of the JSA. In the Arbitrator's view the Company is correct in its view that Mr. Jones was under an obligation to fill the permanent vacancy available in another bargaining unit in accordance with article 7.3(d) of the JSA.

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

September 13, 2002 **(original signed by) MICHEL G. PICHER**
ARBITRATOR