CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3399

Heard in Montreal, Wednesday, 14 January 2004

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:
The application and interpretation of Article 7.3(b) of the Job Security Agreement (JSA).

JOINT STATEMENT OF ISSUE:
The Brotherhood has recently been made aware by the Company of its intention to hire a number of employees in the Running Trades department and is to commence a number of Conductor/Trainperson training sessions in the near future.

The Parties agree that ES status employees that have fulfilled their obligations pursuant to Article 7.3(a) of the JSA and are not holding work within the Bargaining Unit have an obligation and will be required to accept these Running Trades positions, pursuant to the provisions of article 7.3(b). However, the Brotherhood raised the issue of the application of Article 7.9 of the JSA in this instance and takes the position that employees who have exercised their rights under Article 7.9 should have the ability to exercise pursuant to Article 7.3(a), and then, if unable to hold work pursuant to this article, will be required to accept work in another bargaining unit, pursuant to Article 7.3(b).

The Union contends that:

(1.) The provisions of Article 7.3(b) of the Job Security Agreement are clear and unambiguous. It requires an employee who has ES under the provisions of Article 7 and is unable to hold a position in accordance with Article 7.3(a) to exercise, initially on a local basis, then on his basic seniority territory, then on the Region to:

fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit; and

there being none, fill an unfilled permanent vacancy in a position which is not covered by a collective agreement.

(2.) An ES status employee that has exercised his rights pursuant to Article 7.9 cannot be considered as an employee who is unable to hold a position in accordance with 7.3(a).

(3.) To maintain his ES, an ES status employee who has exercised his rights pursuant to Article 7.9 should not be required to accept a Running Trades vacancy, but rather should be allowed to exercise his seniority pursuant to Article 7.3(a).

The Company contends that if an employee had previously invoked the terms of the JSA article 7.9 and was placed on ES status, that employee does not have the right to exercise seniority, within the BMWE, if required to fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit under the terms of Article 7.3(b).

The Union requests that: **(1.)** The position of the Brotherhood be upheld. **(2.)** The adverse effects suffered by any employee resulting from the Company's position be rectified.

FOR THE BROTHERHOOD: FOR THE COMPANY:
(SGD.) J. J. KRUK (SGD.) E. J. MACISAAC
SYSTEM FEDERATION GENERAL CHAIRMAN MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:
E. J. MacIsaac – Manager, Labour Relations, Calgary
S. Samozinski – Calgary

And on behalf of the Brotherhood:
P. Davidson – Counsel, Ottawa
J. J. Kruk – System Federation General Chairman, Ottawa
D. W. Brown – Sr. Counsel, Ottawa

AWARD OF THE ARBITRATOR

The record discloses that the Company currently has some 140 employees in the bargaining unit of the Brotherhood with employment security (ES) status. Some are employed in other workplaces, in accordance with the provisions of the Job Security Agreement, while some remain idle at home in receipt of employment security payments totalling some 90% of their normal wages and benefits. By reason of a shortage of staff in the ranks of running trades employees the Company is calling upon ES

employees to undertake training and eventually fill vacancies in the bargaining unit of the running trades. According to the Company's representatives, the running trades positions in question are anticipated to be of a permanent nature.

While the parties appear to have had discussions towards a protocol to facilitate the deployment of ES status employees into the running trades positions, they remain apart on one fundamental issue. The Brotherhood does not dispute that as a general matter Maintenance of Way Department employees affected by an article 8 notice who are unable to hold work after fulfilling the displacement obligations of article 7.3(a) of the JSA may be compelled, by reason of the provisions of article 7.3(b) of the JSA, to accept positions in other bargaining units. However it maintains that an exception to that rule exists for employees who have the benefit of article 7.9 of the JSA. That article provides as follows:

7.9 An employee with employment security who has exhausted maximum seniority at his/her home terminal may displace in keeping with his seniority elsewhere on his basic seniority territory or on the region pursuant to the provisions of this article 7. However, such employee will not be required to displace beyond his home location if this would result in a junior employee being placed on ES status. An employee exercising this option shall not forfeit ES providing he otherwise maintains eligibility.

The Brotherhood's case is based on what it views as the clear wording of article 7.3(b) of the JSA. That provisions provides, in part, 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 available options, initially on a local basis, then on his basic seniority territory, then on the Region:

(1) fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit.
(emphasis added)

The logic of the Brotherhood's position is as follows. Its counsel submits that a pre-condition to filling a vacancy within the jurisdiction of another bargaining unit is that the employee

in question, with ES status, is unable to hold a position in accordance with article 7.3(a). According to the Brotherhood, by definition an employee whose ES status falls under the provisions of article 7.9 of the JSA is a person who is "able" to hold a position in accordance with article 7.3(a) of the JSA, save that he or she is exempted from doing so because to exercise the displacement would have the effect of placing a junior employee on ES. In other words, in that circumstance the employee in question has the ability to hold a position, but has exercised a contractual discretion not to displace beyond his or her home location.

Each of the parties marshals purposive arguments in support of their interpretation of these provisions. The Brotherhood stresses that if the Company is correct in its view that it can force an employee who has ES status under the provisions of article 7.9 to accept work in another bargaining unit, the result may be that the individual in question is forced to a distant work location while the junior employee he or she declined to displace may continue to work at a location closer to the senior employee's home location. On the other hand, the Company argues that if the Brotherhood's position is correct there can be no certainty with respect to the status and obligations of employees with ES rights and obligations under the JSA, and that from a practical standpoint the Company's ability to move employees efficiently into vacancies in other bargaining units is frustrated and delayed by the uncertainties of a bumping process which may take weeks or months to resolve itself. As a practical matter the Company's representatives stress that in that circumstance the employer will be compelled to fill vacancies in the running trades positions with newly hired employees, while continuing to bear the burden of ES payments to senior maintenance of way employees who may remain idle at home. That, the Company submits, is not the intention of the Job Security Agreement.

In support of its position the Company submits that a certain amount of past practice has reflected the understanding of the parties that article 7.9 employees may be forced to positions away from their home location. In that regard the example is given of seasonal positions in Montreal being filled on a compulsory basis by article 7.9 employees forced from New Brunswick. While that circumstance involves the application of article 7.3(c) of the JSA, the Company stresses that the same language, "… unable to hold a position in accordance with article 7.3(a) …" operates as the condition precedent under article 7.3(c). The Company questions on what basis the

Brotherhood would have acquiesced in the movement of article 7.9 employees from New Brunswick to Montreal under article 7.3(c) while it is now objecting to the similar application of the same language under article 7.3(b) of the Job Security Agreement.

In the Arbitrator's view it is important to revert to fundamental principles underlying the scheme of employment security in approaching the dispute in the case at hand. As noted in prior awards of this Office, employment security is an extraordinary form of wage protection. It constitutes an unusual benefit of wage insurance in exchange for which employees are deemed obligated to protect work in the sequential manner, based on seniority, described within the agreement. It has long been recognized that certainty and finality are elements of considerable importance in the operation of the displacement provisions of the Job Security Agreement. That was reflected, for example, in the decision of this Office in **CROA 2903** where an employee sought to re-invoke the right to displace after the exhaustion of a five year period of protection against relocation generally referred to as "Larson protection". In dismissing that grievance the arbitrator commented, in part, as follows:

The issue is whether the Job Security Agreement, when read together with the collective agreement, contemplates employees being able to leave Larson protected positions at the conclusion of the five year period, in circumstances where there are no vacancies to which they can exercise their seniority. The Brotherhood claims that the employees in question are entitled to exercise seniority by displacing to higher rated positions, including in other locations, with an entitlement to relocation expenses as contemplated under the Job Security Agreement. The Company's position is that by electing Larson protection the employees have already fully exercised their seniority rights under the provisions of article 7.3 of the Job Security Agreement, and cannot, five years after the fact, engender what it describes as a second chain of displacement to avail themselves of fresh bumping and relocation rights. In the Brotherhood's submission the Company's position creates anomalies as it is agreed, for example, that an employee unable to hold any work whatsoever, who remains idle on employment security protection for the period of five years, is nevertheless entitled, and indeed obligated, to exercise seniority, and displace into the highest rated position such as his seniority would allow, at the expiry of the five year period.

…

Upon a careful review of the Job Security Agreement, as well as the collective agreement, the Arbitrator is unable to accept the interpretation advanced by the Brotherhood. I am satisfied both in the intention of Arbitrator Larson, and in the operation of the present Job Security Agreement, article 7.8 was intended as a qualification to the obligations found under article 7.3. Specifically, it relieves certain defined employees against the relocation obligation contained in article 7.3. There is, however, nothing within the language of the provision, or of the scheme of the Job Security Agreement generally, which would suggest that the employee who invokes the protection of article 7.8 can notionally return to the starting point of the exercise at the expiry of five years, with the right, at that time, to invoke anew the ability to displace, whether locally or regionally, into a position occupied by a junior employee.

In the Arbitrator's view the highly technical and literal interpretation of article 7.3(b) of the Job Security Agreement advanced by the Brotherhood in the case at hand is out of keeping with the fundamental intention of the provisions of the Job Security Agreement. Article 7.9 of the JSA is intended as a narrow exception, whereby employees are not to be forced from their home location if to do so will merely place a junior employee at another location on ES status. Beyond that purpose, it is not intended as an amendment or modification of the more general rights and obligations established within the JSA. Indeed, article 7.9 itself stresses that employees under that article must otherwise maintain ES eligibility. In that perspective, in the Arbitrator's view the fundamental intention underlying article 7.3(b) of the JSA is that an employee with ES under the provisions of that article who does not hold a position in accordance with article 7.3(a) is subject to being required to fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit.

To put the matter differently, I must agree with the Company that a person who chooses the option of protection under the exception of article 7.9 must, in keeping with the overall scheme of the JSA, be deemed to be in the position of an employee "unable" to hold a position in accordance with article 7.3(a). Alternatively, to put the matter in more literal terms, an employee who has opted for the protection of article 7.9 of the JSA can be said to have placed him or herself in a position of "inability" to hold work in accordance with article 7.3(a) since they obviously cannot choose both options.

In the result, I am satisfied that the interpretation advanced by the Company is more consistent with both the language and the intention of the relevant provisions of the Job Security Agreement. The Arbitrator therefore finds and declares that the Company is correct in its view that employees holding ES status under the provisions of article 7.9 of the JSA are liable to be required to fill an unfilled permanent vacancy within the jurisdiction of another bargaining unit in accordance with article 7.3(b)(i).

On that foregoing basis, the grievance must be dismissed.

February 19, 2004

(signed) MICHEL G. PICHER
ARBITRATOR