CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2142

Heard at Montreal, Tuesday, 14 May 1991

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Entitlement of G. Chomokovski, D. McDonald and C. Ashlie to Employment Security benefits.

JOINT STATEMENT OF ISSUE:

On October 12, 1989, the Corporation presented an Article J notice pursuant to the Special Agreement to the Brotherhood, which took effect on January 15, 1990.

The grievors, due to injuries sustained in the Hinton disaster, have been medically unfit to work under Collective Agreement No. 2, since February 7, 1986.

The Brotherhood contends that employees declared unfit under Article 12.6 of the Collective Agreement, who otherwise qualify for Employment Security, by virtue of their seniority, are entitled to full Employment Security benefits. The Brotherhood requests that these three employees be kept on salary or Employment Security until such time as they qualify for positions in accordance with Article 12.6.

The Corporation holds the view that these employees were not adversely affected by the Article J notice. The Corporation maintains that these employees cannot hold work strictly due to their medical restrictions and that they all possess sufficient seniority to hold work under Agreement No. 2 if they were physically able.

The Corporation rejected the claim at all steps of the Grievance Procedure.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) T. MCGRATH	(SGD.) C. C. MUGGERIDGE
NATIONAL VICE-PRESIDENT	DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

D. Fisher	– Senior Officer, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
J. Kish	– Senior Advisor, Labour Relations, Customer Service, Montreal
D. Wolk	– Manager, Customer Services, Winnipeg
P. Hughes	– Observer

And on behalf of the Brotherhood:

A. Cerilli	– Regional Vice-President, Winnipeg
R. J. Stevens	– Regional Vice-President, Toronto

AWARD OF THE ARBITRATOR

On February 8, 1986, while in service, the three grievors sustained serious injuries in the Hinton, Alberta, train accident which involved twenty-three fatalities. These injuries kept them out of service for a substantial period of time. It is common ground that Mr. McDonald resumed work on October 11, 1990 and Mr. Chomokovski became fit for duty on December 17, 1990. Mr. Ashlie still remains off work, as he has not been found medically fit to perform any work within the On-Board Services bargaining unit.

On February 18, 1986 the Corporation advised the three grievors, as well as eleven other employees injured in the Hinton collision, that they would continue to receive wages and benefits. The letter delivered to them stated, in part, as follows:

> In spite of the unfortunate accident in which you were involved at Hinton, we would like you to know that your benefits under the dental, extended health care and life insurance plans will be continued during your absence.
>
> In addition, I am pleased to advise you that you will continue receiving your regular pay based on an eighty-hour cycle at your assigned rate. . .

It appears that in December of 1989 the Alberta Workers' Compensation Board concluded that the grievors were fit to perform certain light-duty clerical functions. It is common ground that no such work was available to them within the On-Board Services bargaining unit. On December 8, 1989 the Corporation decided that it would no longer pay the employees their full salaries. They were advised by letter dated February 12, 1990 that they would no longer be carried on the payroll effective March 15, 1990. The Brotherhood initially interceded to claim the payment of vacation pay as a bridge protection for the employees affected, which claim was voluntarily allowed by the Corporation. This enabled them to remain on payroll through July 5, 1990 for Mr. Ashlie and Mr. Chomokovski and July 17, 1990 for Mr. McDonald.

The grievors were not at work when substantial train service reductions took effect on January 15, 1990. That event involved an Article J notice served on the Brotherhood on October 12, 1989 and the negotiation of a Special Agreement, dated November 19, 1989 to provide the terms, conditions and benefits for employees adversely affected by the reductions in service. Article B of that agreement incorporates the employment security provisions of Article 7 of the Supplemental Agreement governing Employment Security and Income Maintenance negotiated on July 1, 1989. That article protects an employee having four or more years of service from being laid off as a result of an operational or organizational change of the kind implemented on January 15, 1990.

Article 12.15(a) of the collective agreement provides as follows:

> **12.15(a)** Employees returning after leave of absence shall resume their former positions, or may apply in writing within 5 calendar days thereafter to exercise their seniority, if qualified, to any positions bulletined during such absence. Employees thereby displaced shall be permitted to exercise their seniority within 5 calendar days of the date of displacement to any positions they are qualified to fill.

The first position of the Brotherhood is that the grievors should have been allowed, as were other employees who were on leaves of absence, to submit a bid for work under the Special General Bulletining process established for all employees under a Memorandum of Agreement dated November 19, 1989 made pursuant to the Article J notice. It is common ground that other employees on leaves of absence, including sick leave and workers' compensation leave, were notified of the Special General Bulletin and were given the opportunity to bid on positions, even though it was understood that they could not actively assume them at that time. It appears that this was done by way of convenience so as to identify the assignment preferences of employees on leave and subsequently minimize displacement as they returned to work.

It is also common ground, however, that employees who were on leaves of absence at the time of the general bid were not treated as adversely affected by the reductions in service which took effect January 15, 1990. Rather, it was deemed that any adverse effect in respect of them would not be viewed as triggered until such time as they returned to work and claimed an active position. If, at that time, their seniority proved insufficient to claim an active position, and they had four years or more of service, they would then be entitled to the protections of employment security contained in the Supplemental Agreement and the Special Agreement. This treatment of employees on leaves of

absence at the time of the general bid does not appear to have been protested or grieved by the Brotherhood. In the result, the parties have proceeded on an understanding that employees who are on a leave of absence at the time of the reductions in service are not adversely affected until such time as they are eligible to return to active service and find themselves unable to hold a position.

Given the treatment of other employees on leaves of absence, I find that the Brotherhood is correct in its assertion that the grievors should have been given the opportunity to participate in the special general bid established in contemplation of the reduction in service. However, the Arbitrator cannot sustain the position of the Brotherhood that the grievors should be entitled to the protections of employment security from the time they were removed from the payroll. Notwithstanding the hardship of their personal circumstances, for the purposes of the Collective Agreement, the Supplemental Agreement and the Special Agreement they were at all material times employees on a medical leave of absence. Their rights under Article 12.15 of the collective agreement plainly do not arise until such time as they return after their leave of absence, when they are medically fit to resume their former positions. As of March 15, 1990 when all three grievors were removed from the payroll they were not medically fit to return to their jobs. They did not, in other words, come under the terms of Article 7 of the Supplemental Agreement which governs their entitlement to employment security and could not, at that time, be said to have been adversely affected by the events of January 15, 1990. On that basis the Brotherhood's claim for the payment of employment security protection to the grievors cannot be sustained. The grievors cannot claim to be in any better position than other employees on comparable leaves of absence at that time.

The second branch of the Brotherhood's claim, as reflected in the Joint Statement of Issue, is that the three employees should nevertheless be kept on salary. In the Arbitrator's view the merits of this alternative claim are more compelling. The record reveals that on February 18, 1986 the Corporation wrote to the grievors advising them that their welfare and insurance benefits would be continued "during [their] absence" and, in addition, that they would continue to receive their regular pay. As part of that understanding arrangements were made for the assignment of their workers' compensation benefits to the Corporation, ensuring that they remained on the Corporation's payroll. That undertaking on the part of the Corporation was made with the full knowledge and assent of the Brotherhood, whose officers were sent copies of the relevant correspondence. The Corporation's gesture constitutes an act of obvious generosity and compassion towards fourteen employees who had suffered great personal hardship in the service of the Corporation.

Its undertaking was honoured through the duration of the collective agreement which was then in effect. It was, moreover, continued without reservation or qualification through the following collective agreement which was in effect in 1987 and 1988. Finally, no change was implemented, nor was any notice of change given to the employees or the Brotherhood at the most recent round of negotiations for the current collective agreement which is in effect from January 1, 1989 through December 31, 1991.

The position of the Corporation is that the treatment of the grievors was in the nature of *ex gratia* payments which the Corporation was at liberty to terminate when and as it chose, and that it was justified in removing the grievors from the payroll when it was determined by the Alberta Workers' Compensation Board that they were fit for some types of clerical duties, although they were not fit to return to work within their own bargaining unit. With that analysis the Arbitrator has some difficulty. The grievors were among a group of employees injured in a traumatic and high-profile collision at Hinton, Alberta on February 8, 1986. They were themselves badly injured, both physically and emotionally, and it was clear that they would be absent from work for a substantial period of time. In its letter of February 18, 1986 the Corporation effectively told them that they need not worry about their salary or the payment of their benefits "during your absence". It is, in my view, fair to assume that employees in receipt of such a communication, made without qualification or time limit, would naturally be inclined to accept it at face value, and to order their lives in accordance. The Corporation's treatment of these employees might have contributed to removing the uncertainty of multi-party litigation or the risk of negative publicity. From the standpoint of the employees, personal decisions as to the renewal of a lease, the purchase of a home or the renegotiation of a mortgage would, in all likelihood, be made in reliance on the Corporation honouring the undertaking made in its letter of February 18, 1986, so long as their absence from work for the Corporation should continue for bona fide reasons of ongoing medical disability. Decisions to forego other employment opportunities might likewise be induced by the Corporation's letter.

It is, in the Arbitrator's view, noteworthy that the Corporation apprised the employees' union representatives of this arrangement. Arguably, it could not do otherwise under the terms of the **Canada Labour Code**, as it could not

depart from the terms of the collective agreement in the treatment of any employee without the knowledge and assent of their bargaining agent. In the result, the employees and their union went forward, through three separate collective agreements, involving two different sets of renewal negotiations, without being given any indication by the Corporation that it intended to resile from its undertaking in respect of any of the fourteen employees who were victims of the Hinton collision, including the three grievors.

In my view the evidence so viewed sustains the Brotherhood's claim both on the basis of an interpretation of the collective agreement and, alternatively, on an application of the doctrine of estoppel. The undertaking of the Corporation to the employees in question to maintain them on the payroll and to maintain the payment of their dental, extended health care and life insurance plans during their absence must, in my view, be construed as binding for the duration of the collective agreement under which it was undertaken, as well as any subsequent renewal of the collective agreements absent any notice to the contrary prior to or during bargaining. At the negotiation of the current collective agreement the Brotherhood's representatives, as well as those of the Corporation, were aware that the grievors had been provided with payroll protection in excess of the general terms of the collective agreement for a number of years. No conditions or qualifications had ever been put by the Corporation in respect to the continuation of the special treatment of the Hinton victims, and insofar as it appears from the evidence at hand, no contrary indication was made to the Brotherhood during the course of bargaining for the current collective agreement.

The Brotherhood is the exclusive bargaining agent for the grievors as regards their terms and conditions of employment. Given that the Corporation's actions were taken in a collective bargaining regime, I am satisfied that the letter of February 18, 1986 was tantamount to an amendment of the collective agreement as applied to the grievors which was effectively assented to by the Brotherhood. That amendment continued in effect through successive collective agreements without any indication on the part of the Corporation of its intention to terminate it. When the current collective agreement was executed without any further indication in that regard, the Brotherhood and the employees concerned were entitled to conclude that the Corporation's undertaking would continue at least for the duration of the present collective agreement.

Alternatively, if the Corporation's undertaking cannot be characterized as a modification of the collective agreement, in the Arbitrator's view the facts disclosed fall squarely within the concept of estoppel described in **Re CNR Co. and Beatty** (1981) 128 D.L.R. (3d) 236 (Ont. Div. Ct.). As it was expressed by the English Court of Appeals in **Combe v. Combe**, (1951) 1 All E.R. 767 at p.770 the concept of estoppel is as follows:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualifications which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

In the instant case the employees and their union were given to understand by the Corporation that special payroll and benefit protections beyond the general terms of the collective agreement would be continued for the Hinton victims during their absence, an arrangement which was continued without qualification during the renewal of several collective agreements. As noted above, the nature of the undertaking was such as to naturally influence the employees involved in the ordering of their financial affairs and obligations.

In my view, at a minimum, the union and employees concerned were entitled to expect that the Corporation's undertaking would be honoured for the currency of any existing collective agreement, absent proper notice to the contrary prior to or during the course of the open period between contracts. On that basis I am satisfied that the Corporation is estopped from revoking the payments undertaken in its letter of February 18, 1986 until such time as the expiry of the current collective agreement on December 31, 1991. Needless to say, it will then be at liberty to withdraw its undertaking as the parties will then be returned to a position of open and equitable bargaining on this issue.

For the foregoing reasons the grievance is allowed. The grievor, D. McDonald, shall be compensated for all wages and benefits lost for the period between March 15, 1990 and October 11, 1990 at the service coordinator's rate of pay. Mr. Chomokovski shall be compensated for all wages and benefits lost for the period from March 15,

1990 to December 17, 1990 at the senior service attendant's rate of pay. Lastly, the grievor, C. Ashlie, shall be compensated for all wages and benefits lost since March 15, 1990 at the service attendant's rate of pay, and shall be entitled to the continuation of such payments until such time as he returns to work within the bargaining unit, or to such other employment as may be agreed between the Corporation and the Brotherhood, or until such time as the Corporation brings its undertaking to him to a proper termination following the expiry of the current collective agreement.

17 May 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR