CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2147

Heard at Montreal, Thursday, 16 May 1991

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Whether seven (7) employees at Moncton, N.B., have retained their seniority under Collective Agreement No. 2.

JOINT STATEMENT OF ISSUE:

In February 1986, the grievors (A. Bertrand, R. Bourque, M. Cormier, B. Léger, D. LePage, P. Lorette and C. Robichaud) transferred voluntarily from Collective Agreement No. 2 to Collective Agreement No. 1, to be trained for ReserVIA related positions of Telephone Sales Agents or Counter Sales Agents. In 1989, their names were removed from Collective Agreement No. 2 pursuant to Article 11.8. In January 1990, after the implementation of the Article J notice, the Corporation denied these employees the benefits of Employment Security under the Special and the Supplemental Agreements as the Corporation determined that they did not have four (4) or more years of seniority.

The Brotherhood contends that the Corporation has violated Article 11 of Collective Agreement No. 2, the Special Agreement and the Supplemental Agreement. The Brotherhood argues that as the grievors were never recalled for work under Collective Agreement No. 2, they should never have been removed from the Collective Agreement No. 2 seniority list.

The Corporation declined the grievance at all steps of the grievance procedure. The Corporation contends that the grievors could have held work under Collective Agreement No. 2 and they therefore lost their seniority, under that Agreement after six (6) months, and further, that the grievance was untimely as Article 11.4 of Collective Agreement No. 2 requires that protests pertaining to seniority must be submitted within sixty (60) calendar days from the date the seniority list is posted.

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:

C. Pollock	– Senior Officer, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal

And on behalf of the Brotherhood:

T. A. Barrons	– Representative, Moncton
G. T. Murray	– Regional Vice-President, Moncton
R. Dennis	– Local Chairperson, Moncton

AWARD OF THE ARBITRATOR

On the basis of the material filed the Arbitrator is satisfied that none of the grievors lost their seniority under Collective Agreement No. 2. In this regard I accept the submission of the Brotherhood that each of them transferred into the bargaining unit under Collective Agreement No. 1 at a time when they were laid off under Collective Agreement No. 2. On that basis they could not be said to have lost their seniority under the terms of Article 11.8 at the expiration of a six-month period. That article, by its own terms, applies to employees who transfer "while filling positions under this Agreement". I am satisfied that the grievors all fell within paragraph 2 of the agreed terms governing employee initiated transfers from agreement No. 2 to vacancies in agreement No. 1 at Moncton, New Brunswick. That paragraph is as follows;

> **2.** EMPLOYEES WHO ARE LAID OFF FROM AGREEMENT NO. 2 AT THE TIME OF TRANSFER TO VACANCIES IN AGREEMENT NO. 1:
> Employees in category 2 above who are released from O.B.S. and are accepted for vacancies in positions covered by Agreement No. 1, including ReserVIA training, will not have protection of their O.B.S. seniority.
> Such employees will be subject to recall by O.B.S. and failure to respond to any such recall will result in forfeiture of Agreement No. 2 seniority.

It is apparent from the foregoing provision that the employees in question were entitled to recall to work under Collective Agreement No. 2, and that they would forfeit their seniority under that collective agreement only if they failed to respond to such a recall. The Corporation seeks to rely on the fact that there was a hiring of employees into the bargaining unit under Collective Agreement No. 2 during the time the grievors were under service in Collective Agreement No. 1, and that they did not then respond to a recall. The evidence, however, does not sustain the Corporation's assertion. There is no documented evidence before the Arbitrator to confirm that any of the grievors was in fact telephoned or otherwise contacted at the time of the purported recall. On the other hand, the Brotherhood has tendered in evidence sworn affidavits from each of the grievors attesting that they received no call and no written communication in the nature of a recall to work at the time employees were being hired into service under Collective Agreement No. 2. On balance, the Arbitrator is inclined to prefer the evidence of the Brotherhood in this regard. In so doing I am not unmindful of the many cases in which the Corporation and other railway employers have demonstrated little difficulty in tabling calling records and similar documents to sustain their position in cases which involve communications between employer and employee which can affect their legal relations. In the absence of any such documentation, or any adequate explanation for its absence, I see no reason to disbelieve the contrary assertions made by each of the grievors.

The Corporation next seeks to rely on the fact that the grievors' names would not have appeared on the seniority list under Collective Agreement No. 2 as of January 1989. It submits that any dispute concerning their seniority status should have been filed within sixty days, at that time, as contemplated under Article 11.4 of the collective agreement which provides as follows:

> **11.4** Protests in regard to seniority status must be submitted in writing within 60 calendar days from the date seniority lists are posted. When proof of error is presented by employees or their representative, such error will be corrected and when so corrected, the agreed upon seniority date shall be final. **No change shall be made in the existing seniority status of employees unless concurred in by the Regional Vice-President of the Brotherhood**. A supplemental bulletin will be issued by the Corporation and posted by June 30th of each year showing any corrections to the seniority list as provided for above. (emphasis added)

The Arbitrator has two difficulties with the position of the Corporation on this aspect of the case. Firstly, the employer does not deny that the changes to the seniority list effected in January 1989 were made without any notice or discussion involving the Regional Vice-President of the Brotherhood, and that no concurrence from him was obtained, as contemplated within the terms of Article 11.4. Secondly, it is not disputed that the seniority list governing Collective Agreement No. 2 may well not have been posted at the Telephone Sales Service office where the grievors were, for the most part, employed. On balance, the Arbitrator can see no reason to reject the submission of the Brotherhood that in fact none of the grievors was made aware of his or her removal from the seniority list until January of 1990, when they were called upon to exercise their seniority rights in the face of the reductions in service effective January 15, 1990. In the circumstances, having particular regard to the fact that the Corporation admittedly

did not consult with the Brotherhood's Regional Vice-President at the time the grievors were purportedly removed from the seniority list, I find the argument of the Corporation's representative to the effect that the employees were charged with a first duty of vigilance in respect of their seniority status to be less than persuasive, if not inequitable.

In the result, the Arbitrator is satisfied that the grievors could only have lost their seniority under Collective Agreement No. 2 if they had failed to respond to a recall as contemplated in paragraph 2 of the joint document governing the terms of their transfer. For the reasons related above, that condition has not been established in evidence, and I am satisfied, on the balance of probabilities, that they were never recalled. The removal of their names from the seniority list under Collective Agreement No. 2 was effected by the Corporation in error, and must therefore be viewed as a nullity. The Arbitrator finds and declares that the grievors all held seniority under Collective Agreement No. 2 effective January 15, 1990. They then had the status of employees with at least four years of service within the contemplation of Article 7 of the Employment Security and Income Maintenance Plan contained in the Supplemental Agreement of the parties. They were, consequently, entitled to the full rights and protections of Article 7 of the Supplemental Agreement, including the right to employment security status should they have been unable to hold work as of January 15, 1990. The Arbitrator therefore directs that the grievors be restored to the seniority list under Collective Agreement No. 2, without loss of seniority, and that they be compensated for all wages and benefits which they have lost as a result of the Corporation's violation of the collective agreement, with interest to be paid in respect of their wages, given that the Brotherhood's request in that regard was not contested by the Corporation.

17 May 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR