CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 2269

Heard at Montreal, Thursday, 10 December 1992

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

CORPORATION'S STATEMENT OF ISSUE:

In that the Arbitrator retained jurisdiction with respect to the interpretation or implementation of the above award, the Corporation is requesting a supplementary hearing to clarify the following: **1.** Is the Corporation in violation of sub-sections 4(6), 4(7) and 4(8) of the Canadian Labour Standards Regulation as contended by the Brotherhood? The Arbitrator did not address this issue in his award. **2.** Is it intended that Maintenance of Earnings be maintained when a spareboard employee books rest under Article 7.11(b) beyond eight calendar days layover at home terminal for each four-week period? **3.** Is a day in which an employee remains available for a call, but does not work, considered a layover day and included in the eight days specified in Article 4.13?

FOR THE CORPORATION:

(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

M. St-Jules	– Senior Advisor and Negotiator, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
J. R. Kish	– Senior Advisor, Labour Relations, Montreal

And on behalf of the Brotherhood:

T. N. Stol	– National Vice-President, Ottawa

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The parties seek clarification of certain aspects of the Arbitrator's award herein, dated July 18, 1992. At issue is a request for a ruling with respect to an alleged violation of sub-sections 4(6), 4(7) and 4(8) of the **Canada Labour Standards Regulation**, and whether the maintenance of earnings of a spareboard employee can be reduced where he or she books rest under article 7.11(b) beyond 8 calendar days' layover at home terminal for each four week period, whether a day on which an employee remains available for call but does not work is considered a layover day for the purposes of tabulating the eight days' rest contemplated in article 4.13 of the collective agreement and, lastly, the method of compensation of employees "... for any wages or benefits lost by reason of the application of the policy" which the Arbitrator found to be contrary to the Collective Agreement and the Special Agreement.

With respect to the first issue, it is the Arbitrator's view that this Office does not have jurisdiction to make binding determinations with respect to whether there as been a violation of the **Canada Labour Standards Regulation**. That **Regulation** may, of course, be referred to for the purposes of better understanding and applying the parties' own Collective Agreement or Special Agreement, the documents which are both the basis and the limit of my jurisdiction. However, it is quite another matter for this Office to make declaratory rulings with respect to the application of regulations which fall under the jurisdiction of another authority or tribunal. As a first response, therefore, I would find that I have no jurisdiction to make the determination or declaration sought by the Brotherhood in respect of the application of the **Regulation**. In the alternative, if it were within my jurisdiction to make such a determination, I would not find any violation of the regulation. It is plainly intended to apply to the circumstances of regularly assigned employees, and not to those of spareboard employees who are the subject of this grievance. While certain of the spareboard employees who are the subject of the grievance were previously regularly assigned employees, and enjoy incumbencies based on that prior status, they are no longer regularly assigned employees, as a result of the operational and organizational changes which gave rise to the Special Agreement and the incumbency protections which they now enjoy. Those protections are to be found entirely within the terms of the Special Agreement and the Collective Agreement between the parties. In the result, I would find that there has been no violation of sub-sections 4(6), 4(7) and 4(8) of the **Canada Labour Standards Regulation** by the Corporation.

At the hearing the Arbitrator expressed reluctance to respond to the questions put by the Corporation with respect to whether maintenance of earnings are to be maintained when a spareboard employee books rest in excess of eight calendar days' layover at home terminal within a four week period, and whether a day in which an employee remains available for call but does not work is considered a layover and included in the eight days specified in article 4.13 of the collective agreement. The parties must appreciate that arbitration is a fundamentally adversarial process in which the tribunal is called upon to answer only the question put by the grievance. In response to the grievance it was found that the Corporation could not regulate the maintenance of earnings of employees by instituting a system which deprived spareboard employees of a minimum of eight calendar days' layover at the employees' home terminal over a designated four week period. That is the extent of the ruling, and the only ruling which was necessary to the resolution of the issue presented by the Brotherhood. While the Arbitrator has difficulty understanding how an employee could book rest beyond the minimum while maintaining an undiminished maintenance of earnings, in such a way as to achieve a situation more advantageous than would be available to a regularly assigned employee, that circumstance has not materialized in the context of any grievance. It need not be commented upon, therefore, save to say that employees should not expect that the concept of maintenance of earnings can be applied beyond the purpose for which it was originally intended. That purpose is to compensate employees for the loss of work opportunities which, but for the Corporation's operational and organizational change, would have been available to them.

The Brotherhood took the position that the Arbitrator should not deal with the second issue, as to whether not being called can be deemed to be booking rest, on the basis that it was beyond the contents of the original joint statement of issue. With that I cannot agree. The original grievance came to this Office partly because the Corporation adopted a policy of reducing the incumbency of employees who booked rest. Implicit in the resolution of the grievance is some reasonable understanding of what constitutes booking rest. In the circumstances, therefore, I deem it appropriate to deal with the question put by the Corporation with respect to this issue.

With respect to the merits of the Corporation's question as to whether an employee who remains available for a call but does not work is to be considered on a layover day to be included in the computation of eight days specified in article 4.13, the response must be in the negative. The collective agreement plainly makes a distinction as between days on which an employee books rest and days on which a spare employee is available for a call. While the Arbitrator appreciates that article 4.13 is generally intended to apply to regularly assigned employees, the intent of

the Special Agreement is to preserve to the employees who were formerly in that category certain minimum protections. In the Arbitrator's view it would be inconsistent with the Special Agreement and with the award of July 18, 1992 if the Corporation were to calculate a day upon which an employee stands by for a call and remains available for work, but is not called, as a day of booked rest for the purposes of the equivalent of the eight days contemplated under article 4.13 of the collective agreement. The Arbitrator's conclusion in that respect, however, has no bearing on the very different circumstance, noted above, of an employee who makes himself or herself unavailable for work on a day or days in excess of the minimum of eight days for which he or she is entitled to book rest.

The next issue is the matter of the compensation of employees for wages and benefits lost by reason of the application of the Corporation's policy. The Corporation proposes the following:

> 1. that incumbency payments will be restored to all employees for whom they were reduced by virtue of the implementation of the Corporation's policy;
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> 2. the Corporation will pay 5.71 hours, for each day, to any employee in respect of whom it can be shown that he or she did not receive eight days' rest in a four week period and was on the board, and not called for eight days.

In the Arbitrator's view the formula for compensation put forward by the Corporation is preferable to the alternative proposal of the Brotherhood, which would result in overtime payments to the employees affected by a reduction of rest days. In the Arbitrator's view it was at all times open to the employees in question to book rest, while grieving the deduction of their incumbency payments. By following that process, they could have obtained redress of their rights under the Special Agreement, and the Collective Agreement, without any loss of rest. While it may have been financially difficult for many employees to have so proceeded, the suggestion that they could accede to the Corporation's policy, under protest, and thereafter make claims for overtime payments is less than compelling.

I am satisfied, on the whole, that the proposals for compensation advanced by the Corporation is reasonable, and will fairly redress the violation of the Collective Agreement and of the Special Agreement found in the award of July 18, 1992. The Arbitrator therefore directs that the Corporation forthwith compensate all affected employees in the manner proposed by the Corporation, with such compensation to constitute full and final compliance with the award.

December 11, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR