CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2289

Heard at Montreal, Wednesday, 14 October 1992

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

A grievance on behalf of 10 VIA Atlantic Employment Security (ES) employees who were called for work on another region.

BROTHERHOOD'S STATEMENT OF ISSUE:

The above employees are qualified as Service Managers, positions governed by Collective Agreement No. 2.

Following the bulletining process for Service Managers in VIA Quebec in November 1990, the grievors, who were on ES status in VIA Atlantic, were called for the positions in accordance with the Corporation's established calling procedures.

The grievors declined the work and consequently lost their ES protection.

The Brotherhood contends that the grievors were denied the right to exercise their seniority to Agreement No. 1 positions at their home locations at the time of recall. The Corporation would not permit them to do so during the bidding process held in late December 1989, and also at their time of recall. The Brotherhood also alleges that the grievors were not called in inverse seniority order.

The Corporation maintains that there is no mechanism in the collective agreements or the calling procedures to allow ES employees to displace across agreements on their home territory at the time when they are called to fill a vacancy in another region. The Corporation further maintains that these employees were recalled in strict accordance with the Corporation's established calling procedures and that these calling procedures were found to be in conformity with the Collective Agreement and the Supplemental Agreement in CROA 2070.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Corporation:

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

C. Thomas – Human Resources Officer, Montreal
D. Helpateau – Supervisor, Employee Services, Montreal
H. Dickinson – Assistant Manager, On-Train Services, Montreal

And on behalf of the Brotherhood:

G. T. Murray – Regional Vice-President, Moncton
T. A. Barron – Representative, Moncton
F. Bisson – Local Chairperson, Montreal
A. Della Penna – Local Chairperson, Montreal
D. Boisvert – Financial Secretary, Montreal

AWARD OF THE ARBITRATOR

The rules governing the Canadian Railway Office of Arbitration confine the jurisdiction of the Arbitrator to matters specifically identified in the Joint Statement of Issue, or the Ex Parte Statement, as the case may be. This is clearly reflected in paragraph 12 of the Memorandum of Agreement establishing the Office, which reads, in part, as follows:

> **12** The decision of the Arbitrator shall be limited to the disputes or question contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions.

There are a number of issues raised in the statement of issue filed in this matter. The Corporation submits that the issues are confined to the two contentions of the Brotherhood reflected therein. With that submission the Arbitrator cannot agree. The final two paragraphs of the statement of issue relate the position of the Corporation in its discussions with the Brotherhood. It is implicit from the face of the statement of issue that the Brotherhood does not agree with the positions which it describes as being those of the Corporation. Specifically, the statement of issue must be construed as a dispute by the Brotherhood of the position of the Corporation described in the final paragraph, whereby the employer maintains that the employees were recalled in accordance with calling procedures which are in conformity with the Collective Agreement and the Supplemental Agreement. Plainly the grievances, which specifically protest the obligation to respond to a call to a spareboard position on another region, taken together with the statement of issue, must be construed as a timely objection to the position of the Corporation that the employees from VIA Atlantic were compelled to accept calls for service manager's positions in VIA Quebec, failing which they would forfeit their employment security status.

The Brotherhood submits that the terms of the Special Agreement and the Memorandum of Agreement do not allow the Corporation to call employees out of their region to take up spareboard positions. The Corporation responds that the positions in question are "core positions", in that they form part of the minimum number of employees to be maintained on the spareboard, regardless of seasonal fluctuations. In that sense, it submits that they are positions to which employees may be called out of their region.

The provisions to which the Corporation points to support its position are, in the Arbitrator's view, a doubtful basis for the argument made. It points to paragraphs 5 and 6 of the Memorandum of Agreement dated November 19, 1989, as well as to paragraph 8 of a letter dated December 11, 1989 addressed to Mr. A. Cerilli of the Brotherhood. Upon a careful review, the Arbitrator is satisfied that all of those items refer to the agreement of the parties, which is admittedly exceptional, that employees could opt to hold spareboard positions in satisfaction of the requirement to protect their employment security on the occasion of the special general bid of December 4, 1989. There is nothing in any of the agreements or the material before the Arbitrator to suggest that that understanding was intended to have any application after January 10, 1990. The filling of positions after January 10, 1990 is specifically addressed in paragraph 8 of the Memorandum of Agreement of November 19, 1989 which provides as follows:

> **8.** Any vacancies existing after January 10, 1990, will be advertised in the usual manner under the terms of the respective Collective Agreement. In addition, a list of the names of the employees that will be considered on Employment Security effective January 15, 1990 will be made. As future vacancies arise that are available to these Employment Security employees, they will be called in reverse seniority order first from the region on which the vacancy exists and then from a system list.

On the same day that the parties executed the above provision, the Corporation provided to the National Vice-President of the Brotherhood, over the signature of Mr. St-Jules, Manager, Labour Relations, a letter relating generally to the concept of the "regular part time assignment". That letter concludes with the following entry:

> A second question that was asked was "when does an Employment Security employee lose his Employment Security protection?" It is our position that protection stops when:
>
> **a)** the employee is assigned to a regular full-time position or a "Regular Part-Time Assignment"; or
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> **b)** the employee refuses to accept a regular full-time position either when called or by failing to bid; or
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> **c)** resignation, death, etc.

The collective agreement makes distinctions between "regularly assigned employees", who are persons working on jobs obtained by established bulletin procedures and "spare employees" who do not hold an assignment by bulletin. In the Arbitrator's view, absent any evidence to the contrary, the more compelling conclusion is that the parties did not intend to require employees to accept spareboard positions in another region as a condition of retaining their employment security. While I am satisfied that it is open to the Corporation to assign employees who are on employment security status to spareboard duties at their terminal, I cannot find in the agreements of the parties any indication that the terms of paragraph 8 of the Memorandum of Agreement of November 19, 1989 include an understanding that employees would be called from the system list to spareboard positions in a region other than their own. On the contrary, I am satisfied that the reference in the letter of November 19 to an employee refusing to accept "a regular full-time position" as a condition of losing his or her employment security confirms the understanding of the parties that employees would not be compelled to move outside their region to protect spareboard assignments as a condition of maintaining their employment security. The Arbitrator therefore finds and declares that the Corporation violated the Special Agreement, the Memorandum of Agreement and the Collective Agreement by requiring employees on employment security in VIA Atlantic to protect work on the spareboard in VIA Quebec. For the foregoing reasons the grievance is allowed. The Arbitrator directs that the Corporation restore the grievors to their employment security status with compensation for all wages and benefits lost. I decline to make an order with respect to the payment of interest, as the remedial request in that regard was not communicated to the Corporation sufficiently in advance of the hearing.

The Arbitrator further directs that employees who were forced to relocate to VIA Quebec be given the opportunity to return to VIA Atlantic with all relocation benefits and related compensation, should they elect to do so.

October 16, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR