CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2397

Heard at Montreal, Tuesday, 12 October 1993

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The entitlement of Ms. J. Havelock to be placed on E.S. status.

JOINT STATEMENT OF ISSUE:

With the implementation of the January 15, 1990 service reductions, the grievor was unable to hold a position and was therefore placed on Employment Security.

She subsequently obtained a permanent regular part-time assignment on April 24th, 1992, from which she was displaced on July 1st, 1992. The grievor was unable to displace onto other permanent or part-time assignments because of her medical restrictions. She was therefore laid off with Job Security Benefits.

The Brotherhood contends that the Corporation is estopped from denying Ms. Havelock her E.S. status for medical reasons, after having allowed them since 1990. The Brotherhood further alleges a violation of Article 7 of the Supplemental Agreement, Articles 12, 13 and 27.17 of Collective Agreements No. 1 and Appendix 7 of the Human Rights Act.

It is the Corporation's view that the only reason Ms. Havelock cannot work, at this point in time, is due to her medical restrictions. Her seniority is sufficient to allow her to hold regular part-time assignments, as well as permanent regularly assigned positions in Winnipeg, her home terminal. Consequently, her inability to hold work is not the result of an Article 8 notice or the Article J notice of January 1990.

The Corporation denied the grievance and does not believe that any estoppel has been created regarding Ms. Havelock. The Corporation further maintains that the grievor has not lost her E.S. protection. Should she return to a regularly assigned position and be affected by an Article 8 or Article J notice in the future, she will once again be eligible to E.S. protection. The Corporation, with all due respect, does not believe that the Arbitrator has the jurisdiction to hear a complaint concerning a violation of the Canadian Human Rights Act.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) J. D. HUNTER	(SGD.) C. C. MUGGERIDGE
for: NATIONAL VICE-PRESIDENT	DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Pollock	- Senior Officer, Labour Relations, Montreal
C. Rouleau	- Senior Officer, Labour Relations, Montreal
J. R. Kish	- Senior Advisor, Labour Relations, Montreal

And on behalf of the Brotherhood:

K. Naylor	- Representative, Winnipeg
T. N. Stol	- National Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The instant case rests entirely on the claim of the Brotherhood that the Corporation is estopped from denying Ms. Havelock the protection of employment security status. The Brotherhood does not dispute, as a matter of

principle, that an employee who becomes physically unable to perform bargaining unit work can be laid off, whether or not that employee has the protection of employment security.

In the Arbitrator's view the evidence does not disclose the grounds for the application of the doctrine of estoppel. At most, it would indicate that the Corporation exercised a degree of forbearance in the assignment of Ms. Havelock, by reason of her physical disabilities, for a period of some two years. There was, however, no express or implied undertaking on the part of the Corporation that the rules which apply to all employees would not eventually be brought to bear in her case. The forbearance of an employer to exercise its strict rights under a collective agreement in the case of an employee deserving of a certain degree of compassion does not, of itself, give rise to an estoppel. If it were otherwise, there might be little room for compassion in the workplace.

In the result, the Arbitrator can find no violation of the collective agreement or of the supplementary agreement governing the grievor's employment security protection. The issue of the **Canadian Human Rights Act** was not addressed by the Brotherhood at the hearing, either verbally or within its brief, and it is therefore not necessary to deal with it. If it were necessary to so find, I would conclude that the application of the supplemental agreement in the case at hand was not a violation of the Canadian Human Rights Act, to the extent that being reasonably fit for service within the bargaining unit constitutes a *bona fide* occupational requirement. It may be further be noted that the Brotherhood did not seek to negotiate any particular job accommodation under the framework of article 15 of the collective agreement, a possibility raised in correspondence by the Corporation.

For the foregoing reasons the grievance must be dismissed.

15 October 1993

(sgd.) MICHEL G. PICHER
ARBITRATOR