CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2805

Heard in Montreal, Wednesday, 11 December 1996

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The cancellation of an agreement between the Corporation and the United Transportation Union.

EX PARTE STATEMENT OF ISSUE:

On March 17, 1992, VIA Rail and the United Transportation Union entered into an agreement to address a unique situation at the away-from-home terminal of Sioux Lookout, Ontario.

This agreement was to remain in effect only as long as the unique situation existed.

On November 2, 1995, the Corporation notified the Union that item 4 of the agreement dealing with the unique situation at Sioux Lookout would be cancelled in 30 days.

The Union appealed the decision of the Corporation maintaining that the unique situation remains at the terminal of Sioux Lookout.

The Corporation disagreed with the Union and denied the Union's appeal

FOR THE UNION:

(SGD.) M. P. GREGOTSKI
General Chairman

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Officer, Labour Contracts, Montreal
J. C. Grenier	– Labour Relations Officer (ret'd), Montreal
J. M. Lalonde	– Chief of Transportation, Montreal

And on behalf of the Union:

R. Beatty	– Vice-General Chairman, Hornepayne
M. Russel	– Counsel, Toronto
G. Bird	– Vice-General Chairman, Montreal
R. Skilton	– Local Chairman,
R. G. Woehl	– Local Chairman, BLE, Hornepayne

AWARD OF THE ARBITRATOR

The facts relating to this grievance are not in dispute. As a result of a material change notice the parties bargained and executed a Special Agreement dated March 17, 1992. It related to the closure of Capreol as a home terminal for certain of the Union's members and, consequently, the establishing of special provisions for crews who would thereafter be compelled to have extensive layover periods at Sioux Lookout, Ontario, totalling as much as thirty-four hours. This was due, in part, to a change in the schedule for transcontinental trains nos. 1 and 2 in the spring of 1992.

The agreement of March 17, 1992 includes the following provision:

> **4.** The parties recognize that the new crewing between Hornepayne and Sioux Lookout will create a unique situation. This is so because of the lengthy layover (approximately 34 hours) at Sioux Lookout twice a week; also, the lack of transportation facilities to deadhead employees from Sioux Lookout to Hornepayne. To meet that unique situation, the Corporation has agreed that only one half (1/2) of the layover entitlement will be charged against an adversely affected employee's Maintenance of Earnings. This arrangement will only remain in effect so long as the unique situation exists. Should there be any change that reduces significantly the layover time at Sioux Lookout, or should it become practicable to deadhead crews form Sioux Lookout to Hornepayne, the Corporation may terminate the terms of this Item 4 by giving 30 days' notice to the Union.

It is not disputed that the above paragraph went into effect and operated, without substantial incident, as contemplated until the events giving rise to this grievance. In June of 1995, the interest arbitration award of Mr. Justice Mackenzie provided for a new system of remuneration based on hours of service. The implementation of that system of pay occasioned the establishing of a new maintenance of earnings formula, based on the earnings of an individual over the twenty-six pay periods prior to June 15, 1995. In the result, employees whose earnings reflected the benefit of paragraph 4 of the Special Agreement concerning the Sioux Lookout layover had the half layover entitlement included as part of their incumbency calculated pursuant to the Mackenzie Award. In the Corporation's view that was inequitable, as the employees in question would then find themselves in effect receiving one hundred percent layover entitlement over and above their previous maintenance of earnings amount. To put it differently, it submits that the sum contemplated in the Special Agreement of March 17, 1992 has effectively been blended into the new maintenance of earnings formula established under the Mackenzie award. On that basis, the Corporation advised the Union, by letter dated October 27, 1995 that it was cancelling the half entitlement above maintenance of earnings amount for the employees compelled to lay over at Sioux Lookout.

The Corporation's representative, whose presentation was extremely candid, does not deny that the language of the Special Agreement would not, on its face, allow of the Employer's actions. There is no suggestion that the conditions for the giving of notice and termination within paragraph 4 of the letter of March 17, 1992 have been triggered, so as to permit either party to bring that arrangement to an end. However, the Corporation submits that the spirit and intent of the agreement is nevertheless being met, given the consequences of the new maintenance of earnings formula instituted by Mr. Justice Mackenzie's award.

The Arbitrator cannot agree. Firstly, as stressed by the Union's representative, the cancelling of the layover payment to all employees working in service to Sioux Lookout can, in effect, impact both employees whose Mackenzie incumbencies include the prior allowance, and employees newly assigned to the Sioux Lookout service, who would not have the benefit of it. On that basis, it is less than clear that the equities, or the spirit and intent of the agreement, are of substantial guidance to the resolution of this dispute.

This case well illustrates the hazards which parties to a collective agreement subject themselves when they cannot agree on the terms of their own contract, and are compelled to have the terms of their collective agreement fashioned for them by a third party. It is trite to say that it is the parties themselves who are best situated to protect their interests, and address issues such as that which arises in this case. That was plainly not done, however, in the process before Mr. Justice Mackenzie. There is, very simply, nothing which the Corporation can show the Arbitrator which would suggest that the letter of understanding of March 17, 1992 is other than in full force and effect, notwithstanding the terms of the award of the Mackenzie Commission. For reasons which they best appreciate, neither party apparently adverted to nor sought to obtain any adjustment in that letter from the Commission. In the

circumstances the Arbitrator is compelled to agree with the Union that the letter of March 17, 1992 continues in full force and effect, and that it was not open to the Corporation to unilaterally cancel the application of paragraph 4.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Corporation has violated the terms of the letter of March 17, 1992, and directs that the Corporation compensate, forthwith, all employees whose wages and benefits were reduced by reason the Corporation's action. I retain jurisdiction should there be any need to address the issue of quantum, or any other aspect of the interpretation or implementation of this award.

December 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR