CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2974

Heard in Montreal, Thursday, 10 September 1998

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

Whether Ms. Carmen Stracuzza is entitled to maintenance of earnings protection.

JOINT STATEMENT OF ISSUE:

Upon returning from maternity leave Ms. Stracuzza was displaced from her permanent part time assignment at Stratford, Ontario. It is common ground that she had been protected on maintenance of earnings on that position. She elected to displace on a permanent part time position on the Region at Woodstock, Ontario.

It is the Corporation's position that an employee is not required to relocate on the Region to protect maintenance of earnings. However, once she decided to do so, Ms. Stracuzza was obligated to displace to a forty hour week position or forego her M.O.E.

It is the Union's position that the Corporation is in violation of article E of the Special Agreement dated 19 October 1989; as well as article 8.9 of the Supplemental Agreement. The Union requests that Ms. Stracuzza be made whole with respect to any lost wages or benefits.

The Corporation maintains that there has been no violation of the Special or Supplemental Agreements and has therefore declined the grievance.

FOR THE UNION:	FOR THE CORPORATION:
(SGD.) D. OLSHEWSKI	(SGD.) E. J. HOULIHAN
NATIONAL REPRESENTATIVE	FOR: DIRECTOR LABOUR RELATIONS

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Manager, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
L. Laplante	– Labour Relations Officer, Montreal

And on behalf of the Union:

D. Olshewski	– National Representative, Winnipeg
Wm. Coolen	– National Secretary/Treasurer, Montreal
R. Masse	– Regional Representative, Montreal
C. Stracuzza	– Grievor

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. First hired in July of 1980, the grievor worked as a senior counter sales agent, holding a regular position at Stratford prior to the service reductions implemented January 15, 1990. In the fallout of the reductions, Ms. Stracuzza was awarded a forty hour position as a station services agent at Toronto Union Station. She declined to move to that location, however, and forfeited her employment security by accepting a part time assignment with maintenance of earnings at her home terminal of Stratford on January 27, 1990. She held that position until April 15, 1995 when, upon her return from maternity leave, she was displaced in her position at Stratford by a more senior employee. It is the move which she made at that point which gives rise to this dispute.

It is common ground that as a counter sales agent at Stratford the grievor worked a 26.5 hour per week position, receiving forty hours per week in pay, by reason of her maintenance of earnings protection. When she was displaced from the position at Stratford she opted to displace to a counter sales agent's position at Woodstock which involves twenty-eight hours of work per week. The grievor's position is that she is entitled to hold the Woodstock position with a continuation of her maintenance of earnings. The Corporation's position is that the grievor forfeited her maintenance of earnings protection because she failed to accept the highest rated position on her basic seniority territory by declining to assume an available forty hour a week position at Windsor.

The instant grievance must be resolved upon an interpretation and application of article E.2 of the Special Agreement of November 19, 1989 and article 8.9 of the Supplemental Agreement governing the maintenance of basic rates. Those provisions read, in part, as follows:

> **E.2** An employee entitled to maintenance of earnings, who voluntarily exercises his seniority beyond his home location on his seniority territory rather than occupy a position at his home location, shall be entitled to maintenance of earnings. Such an employee will be treated in the following manner: If the position he occupies at his new location is lower-rated than a position he could have occupied at either his original location or his new location, he shall be considered as occupying the higher-rated position, in either case, and his incumbency will be reduced correspondingly.
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> **8.9** An employee whose rate of pay is reduced by $2.00 or more per week, by reason of being displaced due to a technological, operational or organizational change will continue to be paid at the basic weekly or hourly rate applicable to the position permanently held at the time of the change providing that, in the exercise of seniority; he
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> **(a)** first accepts the highest-rated position at his location to which his seniority and qualification entitle him; or
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> **(b)** if no position is available at his location, he accepts the highest-rated position on his basic seniority territory to which his seniority and qualifications entitle him.
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> …

The parties appear to be agreed that there is no material substantive difference between the obligations contained within article E.2 of the Special Agreement and article 8.9 of the Supplemental Agreement. They differ, however, on the scope of obligation upon an employee under article 8.9 of the Supplemental Agreement. Fundamental to the Corporation's position is that the term "location" found within sub-paragraph (a) of article 8.9 of the Supplemental Agreement refers to an employee's job security eligibility territory, as defined under Appendix F of the Supplemental Agreement. It is common ground that various job security eligibility territories are established under that appendix, including territory V-18 which encompasses Stratford, Guelph and Kitchener. The Corporation's position is that that designation defines the grievor's "location" within the meaning of article 8.9 The Union, on the other hand, submits that there is no obligation for an individual to protect on the seniority region, which in the case of the grievor would mean Ontario, to protect her maintenance of basic rates. The Union's representative suggested that the reference to accepting the highest rated position on an individual's "basic seniority territory" reflected in sub-paragraph (b) of article 8.9 was intended to refer to the employee's job security eligibility territory.

Upon a careful review of the materials filed, the Arbitrator cannot sustain the Union's interpretation. Among the documentation before me is a letter dated November 19, 1989 addressed to the predecessor union's National Vice-President from the then Manager, Labour Relations of the Corporation, M. St-Jules. It reads, in part, as follows:

> The purpose of this letter is to confirm the Corporation's position with respect to employees holding Employment Security status and claiming a "Regular Part-Time Assignment" under Collective Agreement No. 1.
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> A so-called Employment Security employee may claim or be assigned to a "Regular Part-Time Assignment". Such employee will be considered as having protected his Employment Security and will be entitled to full salary and benefit, providing:
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> **a)** a junior employee is not awarded a full-time position within his Collective Agreement and Region; or
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> **b)** until the employee fails to apply for a bulletined position on his region within his Collective Agreement and a junior employee is awarded the position.
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> If the employee is affected by either (a) or (b) above, he would remain on the "Regular Part-Time Assignment" with income maintenance protection, in accordance with the Employment Security and Income Maintenance Agreement **until he failed to protect a higher rated or full-time position in his Job Security Eligibility Territory**. If he forfeits his Income Maintenance, he would then become entitled to only the compensation payable to the "Regular Part-Time Assignment". It should be noted that if the reason that the employee lost his Income Maintenance was the employee did not bid a full-time position in his station, he may have lost his seniority.
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> (emphasis added)

As is evident from the language of Appendix F of the Supplemental Agreement, the concept of the job security eligibility territory was fashioned by the parties, in part, "for purposes of application of Article … 8.9 (Maintenance of Basic Rates)." As is reflected in the letter of Mr. St-Jules, once employees have forfeited employment security, as the grievor did, they can remain on a regular part-time assignment with income maintenance protection until they fail to protect a higher rated or full-time position at their location. The letter from Mr. St-Jules, apparently unobjected to by the Union since 1989, appears to confirm that the concept of the job security eligibility territory was established to better define "location" for the purposes of article 8.9 of the Supplemental Agreement. Separate reference is made within the letter to the Region.

In light of the foregoing, when article 8.9 is applied to the circumstances of the grievor, it appears indisputable that upon her displacement there was no position available to her at her location, meaning her job security eligibility territory comprising Stratford, Guelph and Kitchener. In that circumstance, she was compelled to fulfill to the obligation described in sub-paragraph (b), namely to protect the highest rated position on her basic seniority territory to which her seniority and qualifications entitle her. In the case at hand that would have been the full time forty hour position available at Windsor. Consequently, I am compelled to conclude that the grievor's failure to protect that work, opting instead to assume a part time position at Woodstock, did result in the forfeiture of her maintenance of earnings protection.

This is not a case where the Union can successfully invoke estoppel by reasons of the Corporation's actions. While it appears that at one point in time Ms. Stracuzza did receive confusing and arguably conflicting advice from her immediate supervisor at Stratford with respect to her options and the protection of her incumbency, the evidence confirms that she sought further clarification by communicating directly with Labour Relations Officer, Ms. Lynn Laplante, at the Corporation's headquarters in Montreal to clarify her circumstances. Ms. Laplante clearly informed the grievor that she was liable to forfeit her maintenance of earnings should she opt to protect a part time assignment in lieu of a full time position which might then be available to her.

In the result, the Arbitrator is satisfied that the grievor's rights in respect of her maintenance of earnings protection were properly administered by the Corporation. When she was displaced from her regular part time assignment at Stratford, with maintenance of earnings protection, it was then incumbent upon her, absent any other position being available at her location or job security eligibility territory, to accept the highest rated position on her basic seniority territory, which includes Windsor. Her failure to do so took her outside the proviso in article 8.9 of the Supplemental Agreement, and properly caused the forfeiture of her maintenance of earnings protection.

For the foregoing reason the grievance must be dismissed.

September 11, 1998

(signed) MICHEL G. PICHER
ARBITRATOR