CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD IN

CASE NO. 3189

Heard in Montreal, Thursday, 13 September, 2001

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

MOE payments following reinstatement under Award 3189.

BROTHERHOOD'S STATEMENT OF ISSUE:

Previously discharged Locomotive Engineers Dave Simpson and Jack Strachan were reinstated to active employment under the decisions set out in CROA award number 3189.

Both locomotive engineers were previously awarded incumbencies as a result of the Mackenzie Award in 1995. Since their reinstatement to service the Corporation has refused to recognize payment of their MOEs.

The Brotherhood submits that these 2 employees were treated differently and should receive their MOE payments due. It is further submitted that the grievance procedure contained in existing collective agreement serves to change the discipline level of discharge to a lesser penalty.

FOR THE BROTHERHOOD:

(SGD.) J. R. TOFFLEMIRE
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Manager, Labour Relations, Montreal
G. Benn	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

J. R. Tofflemire	– General Chairman, Oakville

AWARD OF THE ARBITRATOR

The parties have referred this matter back to the Arbitrator for completion of the award. In the decision in this matter, dated March 16, 2001, this Office concluded that Locomotive Engineers Strachan and Simpson did commit serious rule violations in the operation of Train No. 53 from Montreal to Toronto on August 10, 2000. The nature of the incident, and its seriousness, are reflected in the following passage from the award:

> In the Arbitrator's view the Corporation's concern with respect to the incident which resulted in the dismissal of the grievors is understandable. The overspeed of a passenger train through a crossover switch, with an application of emergency brakes and possible damage to the switch itself, all of which went unreported by the grievors, is obviously extremely serious. As is evident from the submissions made by the Corporation's representative, a substantial part of its concern is prompted by what it views as the wilful concealment of the incident by Mr. Strachan and Mr.

> Simpson who, it is not disputed, made no report of the incident to the Rail Traffic Controller at the time it occurred, nor any mention of it in their trip report filed with the Corporation at the end of their tour of duty. In his submission the actions of the grievors are properly comparable to those of another locomotive engineer in the service of the Corporation whose dismissal for the concealment of rules' infractions was recently sustained by this Office in **CROA 3181**.

In the result the Arbitrator concluded, however, that mitigating circumstances, including the treatment of other locomotive engineers in similar circumstances, merited a reduction of penalty. In the penultimate paragraph the following conclusion was reached:

> When all of these factors are taken into consideration, I am satisfied that a reduced penalty is appropriate, albeit one which reflects a serious measure of discipline. The reinstatement into employment of the grievors at this time, without compensation for any wages or benefits lost, would amount to a six month suspension for the rules infractions which they committed. In light of the length and quality of their prior service, I cannot agree with the Corporation that the bond of trust between themselves and the Corporation cannot be restored. Should the Corporation determine, however, that their return to service should involve a period of work in yard service, not to exceed one year, it may, within its discretion, assign them accordingly.

The Arbitrator is advised that the Corporation did exercise its discretion to assign the grievors to yard service for the period of one year. They have accordingly been placed in the 0500 Yard/Transfer Assignment between Toronto Union Station and Mimico over the Oakville Subdivision, described as the only assignment compensated at yard rates of pay in the VIA system. The Corporation has paid them for their service in that capacity at standard yard service rates of pay. The dispute between the parties now to be resolved arises by reason of the claim of the Brotherhood that the grievors should nevertheless be entitled to the additional benefit of maintenance of earnings protections which they enjoyed in road service prior to their removal from service and their eventual disciplinary demotion following the suspension assessed by the Arbitrator.

It is common ground that the maintenance of earnings protections which each of the grievors enjoyed were the result of the "Mackenzie Award" which implemented a pay system for road service based on hourly service rather than on mileage. The Brotherhood maintains that there is nothing in the language of the maintenance of earnings provisions of the Mackenzie Award, or of the collective agreement, which would address the elimination or reduction or maintenance of earnings in the event of a disciplinary demotion. In this regard reference is made to article K4 of the Mackenzie Award, paragraph (c) of which provides that incumbencies are to remain in place: "… until the locomotive engineers are terminated by discharge, resignation, death or retirement." In the result, as the Brotherhood's primary position, its representative argues that the grievors are entitled to the continuation of their maintenance of earning protection, notwithstanding their demotion to yard service.

The representative of the Corporation submits that the Brotherhood's position is untenable, and would effectively undermine the disciplinary and deterrent effect intended by the Arbitrator's award. He submits that to allow the Brotherhood's request would effectively result in no loss of earnings whatsoever to the grievors who, in the result, would be reassigned into the less onerous duties of yard service on a regular day shift for the period of one year. The Corporation's representative also negates the suggestion of the Brotherhood's brief to the effect that the loss of maintenance of earnings to the grievors would be "perpetual". He stresses that the Corporation recognizes that their maintenance of earning protections arising from the Mackenzie Award have vested, and will be available to them when they return to road service at the conclusion of their disciplinary demotion. He maintains, however, that to apply the maintenance of earnings protections to the grievors during the course of their demotion would be to negate the disciplinary impact of their reassignment to yard service in a manner never intended by the Arbitrator's award, nor by the maintenance of earnings provisions of the collective agreement.

Upon a review of the language of the Mackenzie Award, and of the original award herein, I am satisfied that the position of the Corporation must be sustained. The fundamental purpose of maintenance of earnings protections is to give to employees a degree of wage security in circumstances where material changes are initiated by the employer in such a way as to adversely impact their earnings. In that circumstance a formula is developed, based on the employee's prior rate of earnings over a fixed period of time, to ensure the continuation of the same rate of revenue for the employee so affected. An important condition of maintenance of earnings protections, however, is that the employee in question must protect the highest rate of service which his or her seniority will allow. Failure to do so triggers penalties with respect to the maintenance of earnings payments he or she may receive.

So understood, the concept of maintenance of earnings can be fairly understood as an extraordinary form of wage protection given to an employee subject to the commensurate obligation of that employee to meet certain ongoing conditions of service. In a general sense, that is the bargain which underlies the maintenance of earnings system. In the case at hand, the position advanced by the Brotherhood would clearly disregard that fundamental bargain. By their own serious disciplinary infractions locomotive engineers Strachan and Simpson have placed themselves in a position whereby they cannot protect the highest level of service which their seniority would otherwise allow. That is so because they have, for reasons well elaborated in the initial award, rendered themselves liable to a six month suspension followed by a one year demotion to yard service. Clearly, the disciplinary penalty assessed against them must be understood to operate within the general context of the collective agreement. It could not, for example, be argued that their maintenance of earnings protections applied during the course of their suspension from service, even though there is no express mention of that self-evident fact in the language of the agreement itself. The same, in my view, must be said of the impact of a disciplinary demotion. I must agree with the Corporation's representative that an effective demotion into yard service, while being fully paid at or above rates of road service by the application of a maintenance of earnings formula, would amount to virtually no demotion at all. That is not what was intended by the award of this Office, nor is it in my view contemplated by the provisions of the parties' collective agreement or the Mackenzie Award.

As noted above, the grievors have not lost their vested entitlement to maintenance of earnings, which the Corporation acknowledges will apply at such time as they return to road service. However, so long as they remain under disciplinary demotion into yard service, a period which cannot extend beyond a year, they cannot properly claim the maintenance of earnings payments which could only be theirs if they kept themselves in a position to provide the highest rated service which their seniority would otherwise allow. Nor can they claim the somewhat higher payments they would receive with reduced payment of earnings which would result if they had voluntarily bid to lower rated work. That is not what occurred in the circumstances.

For all of the foregoing reasons the position of the Brotherhood must be rejected.

September 14, 2001

(signed) MICHEL G. PICHER
ARBITRATOR