CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3547

Heard in Montreal Tuesday, 11 April 2006

Concerning

VIA RAIL CANADA INC.

and

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

EX PARTE

DISPUTE:

Concerning a policy grievance on behalf of R. Bhaggan, G. Holowochyuk, B. Johnston, J. Jean and any others similarly affected and concerning the method of payment when employees exercise their right to book rest under article 4.22(b).

UNION'S STATEMENT OF ISSUE:

On October 24th, 2004, Train No. 1 arrived at Vancouver 9 hours late. The late arrival was 2-1/2 hours after reporting time, for the return leg of the trip (back to Winnipeg) on Train No. 2. It is common ground that in such cases employees may book rest pursuant to article 4.22(b) of collective agreement no. 2. The four aforementioned employees did so. The Company compensated them as if they were on layover days at 5.71 hours per day.

It is the Union's position that the employees were required to deadhead home and that the proper compensation in such cases is at 12 hours per day pursuant to article 4.10 of the collective agreement.

The Union requests the aforementioned employees be made whole for any lost wages as a result of the Corporation's actions.

The Corporation denies any violation of the collective agreement.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

E. J. Houlihan	– Director, Labour Relations, Montreal
L. Mayes	– Manager, Customer Services
D. Beardman	– Manager, Customer Services
D. Stroka	– Sr. Officer, Labour Relations, Montreal
A. Richard	– Sr. Officer, Labour Relations, Montreal

And on behalf of the Union:

D. Mercer-Hazlitt	– Regional Representative
D. Kissack	– Local Chairman, Winnipeg

AWARD OF THE ARBITRATOR

At the hearing of this matter the Union sought to make arguments with respect to the application of the **Canada Labour Code** and the **Canadian Human Rights Act**, alleging discrimination and violations of the wage provisions of those statutes. While there may have been some discussion of those issues during the course of the grievance procedure, they were not identified as any part of the dispute as reflected in the Union's Statement of Issue filed with this Office on June 5, 2005. For reasons which both parties best appreciate, as reflected in the rules of this Office, the grievance is to be resolved in accordance with clause 14 of the memorandum of agreement of May 20, 2004 which governs the procedure in the Canadian Railway Office of Arbitration & Dispute Resolution. That clause reads, in part, as follows:

> **14.** The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted 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. …

It would appear that following the filing of the Union's statement of issue it's then representative attempted to negotiate a differently worded joint statement of issue with the Corporation, but without success. In the result, I am compelled to take the issues as they are framed in the statement of the Union dated June 5, 2005. On that basis the objection of the Corporation with respect to dealing with the provisions of the **Canada Labour Code** and the **Canadian Human Rights Act** must be sustained.

The facts are not in dispute. Train no. 1 arrived at Vancouver on October 24, 2004, more than 9 hours late, at 16:55. Its crew was scheduled to depart Vancouver, working back towards Winnipeg, departing Vancouver at 17:30. A number of the employees in the crew exercised their option not to work their return assignment, an option available to them under the provisions of article 4.22(b) of the collective agreement. As indicated in the Union's statement of issue, its first position is that the employees were effectively required to deadhead home and should therefore be compensated pursuant to the deadhead payment provisions of the collective agreement. The Corporation maintains that they were not in fact deadheading, and were not entitled to any such payment. It maintains that they were adequately protected by the non-reduction of their guarantee of 320 hours' pay for an eight week period, a guarantee which might otherwise be reduced by reason of their having declined to perform scheduled work.

The following provisions of the collective agreement are pertinent to this dispute:

4.2 (c) Regularly assigned employees who do not complete their assignment for whatever reason (excluding vacation with pay) will be entitled to minimum hours as follows:

$$\frac{\text{No. of Days Worked (including layover days)}}{\text{No. of Days in 8-week period}} \times 320$$

…

4.10 Employees deadheading on a car or on a pass on railway business shall be credited with twelve (12) hours for each 24-hour period and actual time up to twelve (12) hours for less than a 24-hour period (time to be computed from reporting time to release time).

4.22 (b) Assigned employees arriving at an away-from-home terminal after the established reporting time for the return movement of their assignment, as shown on the Operation of Run Statement, having been enroute for two (2) nights or more (i.e. between 2400 hours and 0700 hours) will not be required to return on their assignment unless there is a minimum period of eight (8) hours between arrival time inbound and actual train departure time for the return movement. If, under these circumstances, employees have been enroute for one (1) night only (i.e. between 2400 hours and 0700 hours), they will be returned on their assignment provided there is a minimum period of two (2) hours and thirty (30) minutes between arrival time inbound and actual train departure time for the return movement. These provisions will apply only when other qualified employees are available to protect the service.

As can be seen from the facts related in the statement of issue, the employees who are the subject of this grievance qualified under the provisions of article 4.22(b). They were, in other words, not required to return on their assignment. It would appear that the circumstance contemplated within this article can only arise in transcontinental service, and as a general matter very rarely. It does not appear disputed that since at least 1998 the Corporation has allowed employees falling under the terms of article 4.22(b) to return to their home station on the train which would otherwise have been their working assignment. For that trip they are not, however, paid for deadheading under the terms of article 4.10, because they are not then travelling in accordance with a directive or requirement of the employer. In that circumstance, however, the Corporation does not apply the lost working opportunity in reduction of the wage

guarantee of 320 hours over an 8 week period, as provided in article 4.2(a) and (b) of the collective agreement.

In approaching this dispute it is instructive to examine the history of article 4.22(b) of the collective agreement. The language of what is presently article 4.22(b) existed verbatim as the first paragraph of that article in the collective agreement which was in effect in 1991, and as far back as 1978. That iteration of the collective agreement contained further provisions, however. It included, in part, the following paragraph:

> Such employees will be returned to their home terminal utilized to best service advantage with least possible delay. If returned in service, they will be credited with not less than the O.R.S. hours of their assignment. If returned deadhead, payment will be in accordance with article 4.10 and their guarantee will be protected.

The Union's representative submits that it is not open to the Corporation, as it has done over the period of the last two collective agreements since 1998, to gratuitously protect the guarantee of employees who fall under the provisions of article 4.22(b) of the collective agreement, as it did in this case, and to fail to pay them wages in accordance with article 4.2 or article 4.10 of the collective agreement. Counsel for the Corporation responds that the Corporation would itself be estopped from discontinuing the practice which it has followed consistently, protecting the guarantee of employees who find themselves in the article 4.22(b) circumstance. He also stresses that the removal of the deadhead payment language from article 4.22(b) as it existed in collective agreements prior to 1991, clearly reflects the understanding of the parties that deadhead payments are not payable in this circumstance.

The Arbitrator has considerable difficulty with the case as presented by the Union. Firstly, I can find no basis for support of the Union's allegation of "discrimination" in the recent decision of the Supreme Court of Canada in **Air Canada v. Canadian Human Rights Commission and Canadian Union of Public Employees (Airline Division) et al**, a decision dated January 26, 2006, as argued by its representative. That decision deals with discrimination in the sense of pay equity rectification for female employees within a predominantly female employee group. While the Court discussed and ruled upon the interpretation of the word "establishment" for the purposes of pay equity comparisons, nothing within that judgement can be taken as mandating pay equity protection as between two groups predominantly of the same sex. On that basis, the Arbitrator has great difficulty understanding or giving effect to the arguments of alleged discrimination made by the Union's representative even assuming that other groups of employees, including employees in this bargaining unit, have negotiated different conditions.

I am satisfied that the answer to this dispute lies in the collective agreement itself. It appears to the Arbitrator that the provisions of article 4.2(c), which govern the reduction of the guarantee of minimum hours and article 4.22(b), which governs the facts at hand, must be read as a rational whole. It is not, in my view, inappropriate nor even "gratuitous" for the Corporation to decline to treat an uncompleted assignment which falls under the terms of article 4.22(b) as the failure to complete an assignment for the purposes of article 4.2(c). Article 4.22(b) expressly states that the employees who meet the relatively rigorous qualifications of that provision "will not be required to return on their assignment". In the Arbitrator's view that is tantamount to saying that

they are, by the direction of the Corporation, relieved of their assignment and cannot, therefore, be said to have not completed their assignment for the purposes of article 4.2(c). In other words, the action of the Corporation in protecting the guarantee of the employees who are the subject of this grievance was entirely consistent with the language and intention of the agreement as their return assignment was deemed nullified by the operation of article 4.22(b).

Alternatively, if the foregoing conclusion is not correct, the grievance must still fail. It is not disputed that for a considerable period of time, at least since 1998, the Corporation has interpreted and applied article 4.22(b) in the manner which it did in the case at hand. It has not paid employees who return home in circumstances which do not amount to a directed deadhead or, in the parlance of article 4.10, deadheading on railway business. And, it has not reduced their guarantee. The Corporation's practice would appear to have been consistent over the years, and to have continued without objection through at least one renewal of the collective agreement. In that context, I am satisfied that at a minimum the Union would be estopped from successfully grieving the accepted practice and insisting on its view of the strict application of the collective agreement. The Union has directed the Arbitrator to no provision in the collective agreement which deals with the payment for deadheading, beyond the express provisions of article 4.10. Moreover, bearing in mind that the Union bears the onus is this grievance, there is no explanation given by the Union's representative as to the removal of the deadhead payment provision which was previously expressly provided for under the terms of article 4.22(b) as of and prior to 1991.

Whether from the standpoint of the application of the provisions of the collective agreement as the Arbitrator considers they should be interpreted, or from the standpoint of the well established and accepted practice of the Corporation which, I am satisfied, would sustain an estoppel, there is no basis upon which this grievance can succeed. The grievance is therefore dismissed.

April 20, 2006

(signed) MICHEL G. PICHER
ARBITRATOR