# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 3852

Heard in Montreal, Thursday, 14 January 2010

Concerning

**VIA RAIL CANADA INC.**

and

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

**EX PARTE**

**DISPUTE:**

The application of articles 7 and 8 of the Supplemental Agreement of Collective Agreement No. 2, subsequent to the abolishment of the Assistant Service Coordinator (ASC) position on Trains no. 14 and 15 effective February 1, 2009.

**JOINT STATEMENT OF ISSUE:**

It is the Union's position that the Corporation is in violation of articles 7.6(b) & (c) by denying Maintenance of Earnings (MOE) protection while Ms. Jessica Leblanc is on the spareboard, following the exercise of her seniority at her home terminal of Halifax. "An employee may instead elect to operate from the Spare Board at his home terminal with Maintenance of Earnings."

The Union requests that Ms. Leblanc be made whole, with compensation of MOE of 40 hours per week and benefits, effective from February 4, 2009, while on the spareboard, as per articles 7.6(c),, 7.6(c) and 8.9 of the Supplemental Agreement.

The Corporation submits that Ms. Leblanc was hired on May 25, 1998. As such she does not qualify as an "eligible" employee under the terms of articles 7 and 8 of the Supplemental Agreement.

In accordance with articles 7 and 8 of the Supplemental Agreement, MOE benefits are intended for “eligible” employees hired prior to May 15, 1994.

| **FOR THE UNION:** | **FOR THE CORPORATION:** |
|---|---|
| **(SGD.) R. FITZGERALD** | **(SGD.) D. STROKA** |
| NATIONAL REPRESENTATIVE | SR. ADVISOR, LABOUR RELATIONS |

There appeared on behalf of the Company:

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| D. Stroka | – Sr. Advisor, Labour Relations, Montreal |
| S. Duffy | – Manager, Customer Experience, Halifax |
| N. Desrochers | – Specialist, Payroll Service, Montreal |
| J. Pastor | – Advisor, Labour Relations, Montreal |

And on behalf of the Union:

| | |
|---|---|
| R. Fitzgerald | – National Representative, Toronto |

## AWARD OF THE ARBITRATOR

This grievance arises following the issuing of an Article 8 Notice under the Supplemental Agreement of Collective Agreement No. 2 by the Corporation on October 29, 2008. The notice concerned the abolishment of five regular assigned Assistant Service Coordinator (ASC) positions at Halifax effective February 1, 2009.

As a result of the operational change, the grievor, who was hired after May 15, 1994 was displaced from her position as a regularly assigned SSA and elected to displace to the spareboard where she perform works in the same classification. It is not disputed that the amount of work on the spareboard would in all likelihood involve a reduction in her earnings. Consequently, the Union claims that Ms. Leblanc is entitled to income maintenance protection under the provisions of article 8 of the Supplemental

Agreement. The Corporation maintains that as she was hired after May 15, 1994, the grievor is not so entitled.

In support of its position the Union cites the provisions of articles 8.8 and 8.9 of the Supplemental Agreement which provide as follows:

> **8.8** In addition to all other benefits contained in this Agreement which are applicable to all eligible employees, the additional benefits specified in Article 8.9 and 8.10 are available to employees who are materially and adversely affected by technological, operational or organizational changes instituted by the Corporation.
>
> Maintenance of Basic Rates
>
> **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 qualifications 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 maintenance of basic rates, and four-week guarantees if applicable, will continue until:
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> **(i)** the dollar value of the incumbency above the prevailing job rate has been maintained for a period of three years, and thereafter until subsequent general wage increases applied on the basic rate of the position he is holding erase the incumbency differential; or
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> **(ii)** the employee fails to apply for a position, the basic rate of which is higher by an amount of $2.00 per week or more than the basic rate of

the position which he is presently holding and for which he is qualified at the location where he is employed; or

**(iii)** the employee's services are terminated by discharge, resignation, death or retirement.

In the application of (ii) above, an employee who fails to apply for a higher rated position, for which he is qualified, will be considered as occupying such position and his incumbency shall be reduced correspondingly. In the case of a temporary vacancy, his incumbency will be reduced only for the duration of that temporary vacancy.

An example of the application of Article 8.9(b)(i) follows:

| DATE | BASIC RATE | INCUMBENCY LEVEL |
|---|---|---|
| October 1, 1985 | $450.00 | $500.00 |
| January 1, 1986 (4% inc.) | $468.00 | $518.00 |
| January 1, 1987 (3% inc.) | $482.04 | $532.04 |
| January 1, 1988 (3% inc.) | $496.50 | $546.50 |
| January 1, 1989 (3% inc.) | $511.40 | $546.50 |
| January 1, 1990 (3% inc.) | $526.74 | $546.50 |
| January 1, 1991 (3% inc.) | $542.54 | $546.50 |
| January 1, 1992 (3% inc.) | $558.82 | Incumbency disappears |

For the purposes of this Article 8.9, the basic rate of a position paid on a four-week guarantee basis shall be converted to a basic rate on a forty-hour week basis.

**Example**: The basic rate of an employee who is guaranteed 179.3 hours for each four-week period, comprised of 160 straight time hours and 19.3 hours at time and one-half which is the equivalent of 189 straight time hours, is $3.00 per hour at the straight time rate. Inasmuch as his guarantee represents $657.00 per four-week period, his basic weekly rate shall be considered as $141.75 and his basic hourly rate shall be considered as $3.54.

**Note**: The method of administering incumbencies as outlined in Clause 8.9(b)(ii) will be applied to any employee who was placed on an

> incumbency rate under the provisions of the April 28, 1978 Job Security Agreement, and the three year period will commence from the date of the establishment of the incumbency rate.

The fundamental point of distinction between the positions of the parties concerns the application of article 8.9(a) and (b) to the facts of the given case. Essentially the Corporation submits that the reference to “position” which appears in both of the sub-paragraphs of article 8.9 refers a full-time regular position which must be protected by the employee before he or she gains any entitlement to maintenance of basic rates. Based on that reading, the Corporation maintains that the grievor was compelled to displace to available regular full-time SSA position in Moncton.

The Corporation relies on the history of maintenance of basic rates and maintenance of earnings as it has evolved over the years to support its interpretation. It submits that it was never the parties’ intention to permit an employee holding a regular full time position to continue to earn the same wages by reason of the maintenance of basic rates following a TO&O change by simply assuming a relief or spareboard position which would generate considerably less work and income. Its unchallenged representation is that it has never provided MBR protection to employees moving from a permanent position to the spareboard. It would appear that the first position of the Corporation is that no employee hired after May 15, 1994 can claim MOE protection. With respect to MBR under article 8.9 of the Supplemental Agreement the Corporation’s position is that the employee in question must exercise their seniority to protect to any

available full-time regular position which their seniority will allow them to hold, something which the grievor has not done in the case at hand.

A review of the history of these provisions, facilitated by the Corporation's presentation, does suggest that the employer's position is more compelling. The general rule, which has evolved over the years, does appear to have been that, absent a contractual understanding to the contrary, employees who displace to the spareboard generally do not have either employment security or wage maintenance protections. That is perhaps best illustrated by the terms of the Special Agreement which the parties negotiated following the massive service reductions forced upon the Corporation on January 15, 1990. By the agreement of the parties the bidding instructions to employees impacted by that change included the following:

> Spareboards, for the purposes of Employment Security only, will be considered as regular full-time assignments.

As reflected in **CROA 2141**, the parties did specifically agree that for the purposes of retaining employment security in that particular fact situation spareboards would be considered as regular full time assignments. Additionally, as is reflected in that award, provision was made for earnings protections for employment security eligible employees who were assigned to the spareboard. There is no suggestion of any such protection for non-protected employees, which is the status of the grievor in the case at hand.

A review of the same Special Agreement is **CROA 2269** confirms the general rule that absent specific contractual provisions to the contrary, spareboard employees do not benefit from maintenance of earnings protection. In that award the following comments appear:

> The concept of maintenance of earnings or maintenance of basic rates has relatively broad application in the railway industry. It is found, for example, within article 8.9 of the Supplemental Agreement between the parties to this grievance, made July 1, 1989. Maintenance of earnings is a measure to minimize the adverse impact upon an employee of an event, such as a substantial reduction in staff resulting from change in operations. Simply put, maintenance of earnings gives to the employee who is required to displace into a lower paid position an incumbency rate which reflects the rate of earnings which he or she enjoyed prior to the change. Generally, as a condition of retaining the protection of maintenance of earnings the employee is required to exercise his or her seniority so as to occupy the highest rated position, within a defined geographic area, which his or her seniority and qualifications will secure. The failure to take such a position can, depending on the circumstances, result in the reduction or loss of an employee's maintenance of earnings protection.
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> It is common ground that the Special Agreement which is the subject of this grievance is the first occasion upon which the parties have agreed to extend maintenance of earnings protection to employees in spareboard service. The terms of a memorandum of agreement made between the parties on November 19, 1989, governing a general bid for positions following the abolishment of all previous positions, effective January 15, 1990, contemplates, in article 6, that employees covered by Collective Agreement No. 2 who were unsuccessful in securing a regular assignment could elect to operate from the spareboard.

Upon a review of the history of these provisions, the Arbitrator must conclude that for the purposes article 8.9 of the Supplemental Agreement, which governs the eligibility to the maintenance of basic rates, the obligation of an employee to accept "the highest rated position" either at his location or on his or her Basic Seniority Territory refers to a regular position. To put it differently, holding a place on the spareboard is not to hold a position, but merely access to work on a relief and as needed basis. That

status has never, as the Corporation has demonstrated, entitled an employee to the protection of the maintenance of basic rates.

It should be noted that in coming to the foregoing conclusion the Arbitrator relies solely on the interpretation of article 8.9 of the Supplemental Agreement. Nothing in this award should be construed as accepting the broader proposition put forward by the Corporation to the effect that non-protected employees can never have the benefit of maintenance of earnings or maintenance of basic rates. That argument, which is based entirely on the application of article 7 of the Supplemental Agreement which governs employment security need not be addressed for the purposes of resolving the instant grievance.

For all of the foregoing reasons the grievance must be dismissed.

January 18, 2010

**(signed) MICHEL G. PICHER**
**ARBITRATOR**