CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1607

Heard at Montreal, Wednesday, January 14, 1987

Concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Time claim on behalf of Mr. I. Prescott and other employees for performing work in two sleeping cars as a result of Corporate changes effective January 30, 1986.

JOINT STATEMENT OF ISSUE:

Following the rejection of the second settlement for Collective Agreement No. 2 by the membership, the Minister of Labour informed both the Corporation and the Brotherhood on January 15, 1986, that he would be taking no further action to conciliate the dispute.

The Corporation subsequently advised the Brotherhood on January 16, 1986, of its intent to alter the terms and conditions of employment of On-Board Services employees effective January 30, 1986, to include the following:

Porters may be required to perform Porters' duties in more than one sleeping car on trains 11/12 Montreal-Halifax, 59/58 Montreal–Toronto, 9/1–2/10 Montreal and Toronto-Vancouver.

The Brotherhood maintains that the above change is in violation of Article 4.4(a) and Article 23.5 of Collective Agreement No. 2.

The Corporation contends that the change in the terms of employment and conditions was implemented in accordance with Section 148, Part V, of the Canada Labour Code, and within the time frame prescribed therein.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) TOM MCGRATH	(SGD.) A. D. ANDREW
NATIONAL VICE-PRESIDENT	ACTING DIRECTOR, LABOUR RELATIONS.

There appeared on behalf of the Corporation:

D. Andrew	– Director, Labour Relations, Montrea;
M. St-Jules	– Manager Labour Relations, Montreal
C. 0. White	– Officer, Labour Relations, Montreal
J. Kish	– Officer, Personnel & Labour Relations, Montreal
R. Klimczak	– Manager, Human Resources, Toronto

And on behalf of the Brotherhood:

T. N. Stol	– Regional Vice-President, Toronto
T. McGrath	– National Vice-President, Ottawa
A. Cerilli	– Regional Vice-President, Winnipeg
G. Côté	– Regional Vice-President, Montreal
G. Boudreau	– Regional Vice-President, Moncton
J. A. Craig	– Regional Vice-President, Vancouver

AWARD OF THE ARBITRATOR

It is common ground that effective January 30, 1986, a point in time following the expiry of the Canada Labour Code's statutory freeze of the terms of the Parties' Collective Agreement, the Corproation made several changes to

terms and conditions of employment, including an alteration in the assignment of Porters that gives rise to this grievance. It is well settled that the Corporation is at liberty to make such changes during that "open period" (*See* **Re Bell Canada Ltd., and Communications Union Canada 1978**, *17 L.A.C. (2d) 119 (Picher), affd 97 D.L.R. (3d) 132, 23 0.R. (2d) 01 sub nom.* **Re Communications Union Canada and Bell Canada (Div. Ct.)**). The decision of the British Columbia Court of Appeal, as yet unreported, dated October 2, 1986 in **Canadian Association of Industrial Mechanical and Allied Workers, Local 14 and Paccar of Canada Ltd. (Canadian Canworth Companv Division)**, dealing with the provisions of the Labour Code of that Povince, cited by the Union, has no application in this matter. The Arbitrator must therefore conclude that the Corporation was entitled to alter the terms and conditions of employment as it did, and that both the assignment of the work and the remuneration of the employees was in keeping with the provisions of the **Canada Labour Code**, albeit its actions were outside the purview of the Collective Agreement. For that reason the Union's complaint in respect of these actions cannot succeed. In light of that conclusion I need not consider the issue of whether the grievance and arbitration provisions were treated by the Corporation as still in effect. Even if it were so no violation of the Union's rights would be disclosed.

The alternative argument of the Union is that the retroactivity of the subsequent Collective Agreement, which overlaps the period of the disputed assignments, brings the Corporation's actions within the provisions of the current agreement. The Arbitrator has equal difficulty with that submission. While it is generally acknowledged that provisions for retroactivity apply to general provisions such as wage rates and the computation of employees' entitlement to benefits, the predominant arbitral view is that, absent specific language to the contrary, the actions of an employer changing terms and conditions of employment during the open period are not undone by a general provision for retroactivity. This was perhaps best expressed in **Penick Canada Ltd. (1966)**, 17 L.A.C. 296 (Weatherill) here the Arbitrator made the following observations:

> The purposes of the duration clause would appear to be several, and to include (a) the establishement of continuity as between successive agreements; (b) the establishment of equally-spaced termination dates and hence of equally-spaced periods of negotiation; and (c) the provision for retroactivity of at least some of the provisions of the agreement. It is clear that the agreement was meant to provide for retroactivity of the negotiated wage increase. (For a somewhat analogous situation where an employer was required to pay increased overtime rates on a retroactive basis, see **Re U.A.W. and Duplate Canada Ltd. (1952)**, 5 L.A.C. 1779 (Hanrahan). It cannot, however, be said that the effect of the duration clause is to render the collective agreement retroactive for all purposes. While it is clear enough that the provision was intended to make "monetary" items retroactive, it would require the clearest language to transform the legal effect of things done by the parties during the time when there was in fact no collective agreement in effect. To conclude, for instance, that, by virtue of the duration clause, the collective agreement should be considered as being in effect during the time employees were on strike, would necessarily involve the conclusion that the strike was unlawful and would subject the union to a possible liability in damages to the company for its loss of production. It would be impossible, however, in the absence of plain language to such effect, to separate this absurd conclusion from the conclusion that other "non-monetary" provisions of the collective agreement may be considered as being in effect during the period prior to October l3th. There is no such language in the collective agreement.

In the instant case there is nothing in the Collective Agreement that would suggest that the parties intended that the back in time to convert what were lawful actions of the Corporation during the open period to violations of the Collective Agreement executed subsequently. It would, in the Arbitrator's view, require clear and unequivocal language in the Parties' Memorandum of Settlement or Collective Agreement to support such a conclusion.

For all the foregoing reasons the grievance must be dismissed.

(Sgd.) MICHEL G. PICHER
ARBITRATOR