# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 1856

Heard at Montreal, Wednesday, 14 December 1988

Concerning

## VIA RAIL CANADA INC.

And

## CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

### DISPUTE:

The Brotherhood claims that agents performing work on a commission basis should be covered by Collective Agreement No. 1.

### JOINT STATEMENT OF ISSUE:

The Corporation took over the operation of stations at Schrieber, Parry Sound, Foleyet, Hornepayne, White River, Longlac and Nakina from CN and/or CP in August 1986.

Prior to the takeover of these stations, passenger ticket sales were handled on behalf of VIA by CN or CP, in some instances on a part-time basis or contract basis.

The Corporation claims that the volume of ticket sales at these stations did not necessitate the creation of positions covered by the Collective Agreement, and the work was contracted out, as it had been in the past, in accordance with Appendix C of the Collective Agreement.

The Brotherhood requests that the people working at the above locations be considered as employees, and entitled to wages and benefits in accordance with Collective Agreement No. 1.

The Corporation has rejected the Brotherhood's requests, and maintains that the Collective Agreement has not been violated.

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

There appeared on behalf of the Corporation:

| | |
|---|---|
| C. O. White | – Labour Relations Officer, Montreal |
| M. St. Jules | – Manager, Labour Relations, Montreal |
| J. R. Kish | – Personnel & Labour Relations Officer, Montreal |

And on behalf of the Brotherhood:

| | |
|---|---|
| T. N. Stol | – Regional Vice-President, Toronto |
| D. Marinigh | – Witness |

## AWARD OF THE ARBITRATOR

In the Arbitrator's view the facts of this case are in all material respects indistinguishable from those of **CROA 1694**. In that case the contracting out of janitorial work previously performed by CN employees in passenger stations transferred to the Corporation was found to fall within the exception of Paragraph 4 of Appendix C of the Collective Agreement. In that award the Arbitrator observed:

> It is common ground that the Corporation never before performed janitorial services of the kind which were contracted out in the instant case at Stratford and Brantford. In both locations, therefore, it found itself involved in a "new venture", and concluded that the retaining of one complement position, whether on a half-day or full-day basis could not be economically justified. That conclusion is amply justified by the objective realities. The Arbitrator is satisfied that the circumstances in which it found itself, and the conclusion which the Corporation arrived at, are well within the contemplation of Paragraph 4 of Appendix C to the Collective Agreement, and that in these circumstances the contracting out of the work in question is permissible. The circumstances in this case are to be distinguished from those in **CROA Case No. 1596** where it was found that the work of an entire bargaining unit position was contracted out.

In the instant case I must accept the argument of the Corporation that the ticketing responsibilities at the locations in question are in the nature of a "new ... venture" insofar as the work concerned was previously done by means of a contractual arrangement between the Corporation and CN or CP. Insofar as contracting out has been the norm for some years, it cannot be said that the work in question is "work presently and normally performed by employees represented by the Brotherhood" within the meaning of Appendix C.

Alternatively, the Arbitrator cannot accept the argument of the Brotherhood to the effect that the individual commissioned agents in these locations are employees of the Corporation. They are, in most material respects, indistinguishable from independent travel agents who also engage in the sale of Via Rail tickets. The fact that they issue tickets, either manually or by computer, following certain procedures and routines established by the Corporation does not, of itself, constitute evidence of sufficient control and direction as to bring them within the generally accepted concept of an employee. The persons involved, whose activities on behalf of the Corporation seldom exceed one hour in a day, are clearly independent contractors. For the reasons cited above, the Corporation's arrangement with them falls within the exception described in Paragraph 4 of Appendix C.

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

December 16, 1988

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