

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1912

Heard at Montreal, 13 April 1989

Concerning

VIA RAIL CANADA INC.

And

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

Time claim submitted on behalf of Ms. L. Bennett.

JOINT STATEMENT OF ISSUE:

On October 26, 1987, the Corporation assigned a laid-off employee to work a special assignment known as the "Sam Blye Special"

The Brotherhood submitted a time claim for 90 hours and 45 minutes on behalf of the grievor, a more senior laid-off employee, on the basis that the Corporation, in assigning a junior laid-off employee, was in violation of Articles 7.1, 7.2, 7.7, 7.13 and 7.8. The Brotherhood further contends that laid-off employees have no status under the provisions of Article 4.8.

The Corporation contends that it has the right to select employees for special assignments by virtue of Article 4.8 which is a specific clause that overrides the provisions of Article 7.

FOR THE BROTHERHOOD:

(SGD) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD) A. D. ANDREW
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Pollock – Officer, Labour Relations, Montreal
M. St-Jules – Manger, Labour Relations, Montreal
J. R. Kish – Officer, Personnel & Labour Relations, Customer Services, Montreal

And on behalf of the Brotherhood:

A. Cerilli – Regional Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

The material establishes that the Corporation assigned a laid off employee to work the "Sam Blye Special", a Murder Mystery Tour Train running between Toronto and Vancouver in October of 1987 as an addition to the regular consist of the transcontinental "Canadian". The grievor was also a laid-off employee at the time in question, with greater seniority than the employee assigned.

The Corporation relies on Article 4.8 of the Collective Agreement which provides as follows:

4.8 Employees may be used off their assignments in cases of emergency, temporary promoted positions or special assignments and they will be returned to their assignments as soon as practicable.

The Arbitrator is satisfied, nor does it appear seriously disputed, that employees actively assigned to a spareboard would be eligible to be taken off their "assignment" as such for the purposes of Article 4.8 of the Collective Agreement. Article 13.13 governs the recall of laid-off employees when vacancies occur, with laid-off employees being recalled to service in order of seniority. Likewise, Article 7.8 which governs the treatment of employees on the spareboard further provides that when spare board employees are not available to fill a position "... positions may be filled by qualified laid-off employees in seniority order."

The instant grievance is motivated by the Brotherhood's objection to the fact that a junior laid-off employee was recalled, not placed on the spare board, and assigned directly to the special train while the grievor, with greater seniority, remained on lay-off. It submits that the terms of Article 4.8 do not apply to laid-off employees and did not, therefore, justify the Corporation's disregard of the normal recall provisions.

On the language of the Collective Agreement the Arbitrator is compelled to agree with that submission. The purpose of Article 4.8 has been sufficiently reviewed previously (see **CROA 504 CROA 1609**). The article is plainly intended to afford the Corporation the flexibility to remove qualified employees from their assignments when they are needed for special tasks. Having regard to the language of the provision, however, it must be concluded that the latitude given to the Corporation is limited to the complement of employees who are on active assignment, including spare board service.

In the instant case it is common ground that the employees who were recalled for work to the special assignment were on layoff. To that extent they cannot be described as persons "used off their assignments" within the contemplation of Article 4.8. In the case at hand the Corporation has purported to apply this exceptional provision in a circumstance which it was clearly not intended to reach. Since a laid-off employee cannot be said to be fulfilling any assignment, he or she is not available to be deployed for a special assignment by the operation of Article 4.8 of the Collective Agreement, particularly where to do so would circumvent the normal operation of the recall provisions. For these reasons the Arbitrator must prefer the interpretation of Article 4.8 advanced by the Brotherhood in support of this grievance.

What remedy is appropriate in the circumstances? The Corporation suggests that, even if the Brotherhood's interpretation of Article 4.8 should prevail, the grievor might not have been recalled and utilized on the special assignment in any event. While there is some attraction to that suggestion, and it may be that the Corporation would have preferred to look elsewhere within its active ranks to find the person best suited to the special assignment, this cannot now be known with any certainty. Moreover, the displacement of a person within the active ranks may have caused a ripple effect resulting in the need to recall one or more laid-off employees to the spareboard for fill-in service, in which event the grievor might have obtained some work. While the matter is not without some uncertainty, it appears to the Arbitrator that the Brotherhood's claim that the grievor has suffered a loss is, on the whole, well-founded and the remedy claimed is not unreasonable. It would, in my view, be inequitable to deprive the grievor of a remedy when the Company's own disregard of the Collective Agreement has muddied the waters.

For these reasons the grievance is allowed. Ms. L. Bennett shall be compensated forthwith by the Corporation in respect of her claim for 90 hours and 45 minutes at the Service Attendant rate of pay. I retain jurisdiction in respect of any dispute relating to the interpretation or implementation of this award.

April 14, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR