CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1996

Heard at Montreal, Tuesday, 13 February 1990

Concerning

VIA RAIL CANADA INC.

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Time claim for 65 hours at Service Coordinator's rate of pay on behalf of Mr. J. Seesahai, Trains No. 3–4, April 4-9, 1988.

JOINT STATEMENT OF ISSUE:

The grievor, a spareboard employee, while performing terminal duty on April 4, 1988, was required to fill an assignment on Train No. 2, which departed Winnipeg at 10:40 a.m. He had previously been given an assignment during calling hours which required him to report at 19:30 hours that evening. He refused the assignment on Train No.2, and as a result, was removed from service for refusing duty. The incident was investigated, and discipline assessed. Mr. Seesahai's name was returned to the spareboard, and he was called for an assignment the following day – April 5, which he accepted, and later refused.

The Brotherhood has cited a violation of Article 7.2 (the "first-in, first-out" principle), and Article 7.7(a) (assignment within calling hours) to support its claim.

The Corporation has denied the Brotherhood's claim, and maintains that the assignment which the grievor refused during his tour of terminal duty was made in accordance with Article 7.2(ii) of the Collective Agreement.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD) TOM MCGRATH	(SGD) P. J. THIVIERGE
NATIONAL VICE-PRESIDENT	ACTING DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. O. White	– Officer, Labour Relations, Montreal
C. Pollock	– Officer, Labour Relations, Montreal
J. Kish	– Personnel & Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

A. Cerilli	– Regional Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

The first issue to be resolved is whether the Corporation was entitled to assign Mr. Seesahai to Train No. 2. It is common ground that at the time it sought to make that assignment the normal calling hours of 8:00 a.m. to 10:00 a.m. had expired. It is also agreed, however, that he was then at work, performing stand by duty at the terminal.

Article 1.1(g) of the Collective Agreement provides the following:

> **1.1(g)** "Standby" – an employee required to perform terminal duties and be available to fill regular or extra assignments.

The Brotherhood relies, in part, on the provisions of Article 7.7 which provides as follows:

> **7.7(a)** Hours of call shall be established in accordance with service requirements. The names of employees will not be dropped to the bottom of the spare board if they are not available for a call outside the call hours locally agreed upon.
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> **(b)** If employees cannot be contacted during call hours, their names will be placed at the bottom of the spare board as at midnight that day.
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> **(c)** If employees refuse a call, their names will remain off the spare board, until the earliest time the employees who were assigned to the run would return, at which time their names will be placed at the bottom of the spare board in the order they would have arrived.
>
> **(d)** If employees refuse a call or cannot be contacted during call hours for standby or terminal duty only, their names will be placed at the bottom of the spare board as at midnight that day.

The position of the Brotherhood is that during calling hours, and while on standby duty, Mr. Seesahai was called and accepted an assignment on Trains 3 and 4 departing Winnipeg for Vancouver at 1930 hours. Having accepted that call, the Brotherhood's spokesperson submits that he was entitled to decline the subsequent assignment to Train No. 2, which the Corporation purported to give to him outside of the two hour call period which ended at 10:00 a.m. He submits that the grievor was entitled to the benefit of the normal operation of the calling rules under Article 7.7, and that he therefore should have been allowed to assume the assignment he originally accepted on Trains 3 and 4. It is the Brotherhood's position that the Corporation could not require him to accept the assignment on Train No. 2, and that Mr. Seesahai is entitled to his claim for 65 hours for the loss of his tour of duty on Trains 3 and 4. It further asserts that the Corporation had no just cause to assess ten demerits or to remove the grievor from service on April 4, which effectively deprived him of the assignment which he now claims.

The Corporation relies on the definition of standby duty related above, as well as Article 7.2(ii) which reads as follows:

> **7.2(ii)** Standby or terminal duty (except as specified in Article 4.27). Standby employees required for road service after the cut-off time will be assigned in their spare board order.

The first issue to be resolved is whether the employer was entitled to assign the grievor to Train No. 2 on the morning of April 4, 1988. It is not disputed that he was then on standby service as defined under the Collective Agreement and reflected in the terms of Article 7.2(ii). That article makes it clear that an employee in that circumstance is subject to being assigned to road service notwithstanding the expiry of the normal hours agreed for calling time. While the Corporation has the right to make such an assignment, the article requires it to do so on the basis of the spare board order.

The Brotherhood's representative submits that the Corporation could only have assigned the grievor to Train No. 2 on an emergency basis. While I am satisfied that the Collective Agreement contemplates that the road service which may be assigned to employees on standby or terminal duty may involve work that is supplementary or unforeseen, I cannot, on the language of the agreement, find that the Corporation's right to assign employees on standby duty to road service is restricted to circumstances of a proven emergency. While it may have been open to the parties to provide for such a restriction, the parties have not done so. On the contrary, the concept of standby service defined in Article 1.1(g) of the agreement plainly relates more broadly to filling regular or extra assignments. The Collective Agreement provides no qualifications in respect of the obligation of employees at work on standby duty. In the Arbitrator's view the obligations of the grievor to the Company while on duty take precedence over his right to claim a subsequent assignment, notwithstanding that it was made previously under the calling provisions of

Article 7. For these reasons I am compelled to conclude that the Corporation was entitled to assign the grievor to Train No. 2 on April 4, 1988. It follows that it was entitled to impose discipline upon him for declining that assignment.

The next issue becomes the appropriate measure of discipline. It appears from the material before me that the Corporation did not view Mr. Seesahai's refusal of the assignment as constituting a "major offense" within the meaning of the Collective Agreement. It is conceded by its spokesperson that it was a minor offense, a position which must necessarily be taken by the Corporation since no investigation was conducted, as would be required for a major offense according to the terms of Article 24.5 of the Collective Agreement. However, Article 24 also provides as follows:

> **24.2** Employees will not be held out of service for minor offenses. Minor offenses are defined as offenses not involving suspension or dismissal.

It is common ground that Mr. Seesahai was removed from service by his supervisor on April 4, 1988. I must conclude that the grievor's removal from service was for a minor offense, which resulted in a violation of his rights under the Collective Agreement. The issue then becomes what, if any, loss he suffered as a result of that action.

The material before me discloses that the Corporation attempt to restore the grievor to the spare board on the day following his removal from service, April 5, 1988, and offered him an assignment of Train No. 1. Apparently on the advice of his local chairman, he refused that trip, insisting that he be held off the spare board, and be treated for the purposes of the spare board in all respects as though he had been assigned to Trains 3 and 4 on the day prior, and not be restored to the spare board until the return of that train on or about April 9, 1988, subject of course to his claim for compensation for that run.

It appears to the Arbitrator that errors were made on both sides in this circumstance. It might well be that if the grievor had not been incorrectly held out of service on April 4 he would have assumed the assignment on Trains 3 and 4 departing at 19:30 that evening. To that extent it may be that the Corporation's violation of his rights by holding him out of service for a minor offense caused him a loss of earnings. By the same token, however, the grievor's refusal to assume the assignment on the day following was, in my opinion, a violation of his obligation to mitigate his damages. As I found, he was incorrect in his decision to refuse the assignment on Train No. 2 on the morning of April 4, 1988. There is therefore no justification for his position, and that of the Brotherhood, that he was entitled to be compensated in full for the trip of Trains 3 and 4, since by the operation of the Collective Agreement he should have been in service on Train No. 2.

The fact remains, however, that the grievor may have lost wages by being deprived of the opportunity to work, possibly on Trains 3 and 4, because of the Corporation's error in removing him from service for disciplinary reasons. While the precise figures are not before me, and it is difficult to fashion an exact remedy in light of the contingencies, I am satisfied, in the circumstances, that if it can be shown that Mr. Seesahai would have earned a greater amount by completing road service on Trains 3 and 4, than he would if he had accepted the assignment to Train No. 1 which he declined on April 5, he should be entitled to compensation for the difference. The issue is therefore remitted to the parties for their determination of whether, by reason of Mr. Seesahai's having been kept out of service on April 4, 1988, any such difference in potential wages can be established. Should there be any dispute in respect of that exercise, the Arbitrator retains jurisdiction. Because the grievor did violate his obligation to the Corporation in refusing the road assignment given to him while he was on standby duty on April 4, 1988, I am not prepared to disturb or mitigate the assessment of 10 demerits against his record.

February 14, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR