CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2074

Heard at Montreal, Wednesday, 14 November 1990

Concerning

VIA RAIL CANADA INC.

And

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Calling procedures for employees on employment security.

JOINT STATEMENT OF ISSUE:

As a result of the train service reductions of January 15, 1990, calling procedures were established for employees on employment security status covered by Collective Agreement No. 1.

The Brotherhood maintains these procedures violate the bulletining provisions of the collective agreement and contests the Corporation's interpretation of Article 7 – Employment Security – of the Supplemental Agreement.

The Corporation maintains that the calling procedures are in line with the rules of the agreement.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD) TOM MCGRATH	(SGD) C. C. MUGGERIDGE
NATIONAL VICE-PRESIDENT	DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

M. St-Jules	– Senior Negotiator & Advisor, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
M. M. Boyle	– Observer

And on behalf of the Brotherhood:

A. Cerilli	– Regional Vice-President, Winnipeg
T. McGrath	– National Vice-President, Ottawa
G. Murray	– Regional Vice-President, Moncton
A. Della Penna	– Local Chairperson, Montreal
J. Caissyu	– Local President, Belleville
G. Belleville	– Member, Local 335, Belleville
F. Bisson	– Local Chairperson, Montreal
L-P Rousseau	– Member, Local 335, Belleville
J-J Journault	– Local President, Montreal
L. Robichaud	– Witness
K. Pride	– Witness

On Wednesday, 13 February 1991, there appeared before the Arbitrator:

On behalf of the Corporation:

M. St-Jules	– Senior Negotiator & Advisor, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
R. Wesley	– Senior Officer, Labour Relations, Montreal
J. Kish	– Senior Advisor, Labour Relations, Montreal
D. Wolk	– Manager Customer Services, Montreal
M. M. Boyle	– Observer
D. David	– Observer

And on behalf of the Brotherhood:

A. Cerilli	– Regional Vice-President, Winnipeg
T. McGrath	– National Vice-President, Ottawa
G. Murray	– Regional Vice-President, Moncton
R. J. Stevens	– Regional Vice-President, Toronto
R. Moreau	– Regional Vice-President, Montreal
J. Brown	– Representative, Montreal
A. Della Penna	– Local Chairperson, Montreal
F. Bisson	– Local Chairperson, Montreal
J-J Journault	– Local President, Montreal
K. Williams	– Secretary, Local Grievance Committee, Winnipeg
K. Sing	– Local Chairperson, Halifax
R. Dennis	– Local Chairperson, Moncton
L-P Rousseau	– Member, Local 335, Belleville
L. Robichaud	– Witness

AWARD OF THE ARBITRATOR

This grievance concerns the treatment of employees on employment security status following the reduction in service implemented by the Corporation effective January 15, 1990. Specifically, it concerns the application of the terms of the Supplemental Agreement between the Brotherhood and the Corporation which makes general provision for the employment security protections of employees, as well as the further application of a Memorandum of Agreement signed between the parties on November 19, 1989 as well as a Special Agreement executed on the same date. The circumstances surrounding the reductions in service which went into effect on January 15, 1990, were related in a prior arbitration award between these parties concerning the interpretation of Article 7 of the Supplemental Agreement, which award was dated November 27, 1989. Consequently, those facts need not be reiterated here.

Through this grievance the Brotherhood submits that the calling procedures governing employees on employment security status adopted by the Corporation are in violation of the bulletining provisions of Collective Agreement No. 1 which governs Off-Train employees. Specifically, it takes issue with procedures adopted by the Corporation for the filling of future vacancies, as they appeared initially on January 15, 1990 and were subsequently revised effective July 1, 1990.

The principal point of dispute in this grievance concerns the awarding of vacancies which have arisen or will arise after January 10, 1990. Under the terms of the Memorandum of Agreement of November 19, 1989 the parties agreed that effective January 14, 1990 all existing positions in Collective Agreements No. 1 and No. 2 would be abolished, with all employees being deemed adversely affected for the purposes of the application of the Special Agreement of the same date. It was agreed that a special regional bulletin would issue on December 4, 1989, to be posted on each region listing all positions and regular part-time assignments that would be affected on January 15, 1990 under both collective agreements. Applications would be entertained for those positions until December 14, 1989. Under Paragraph 3 of the Memorandum of Agreement employees were requested to indicate, if they were unsuccessful in obtaining a permanent position, whether they intended to take layoff, or to protect their employment security "... on their region or on the entire system." Under Paragraph 5 of the Memorandum of Agreement it was agreed that on December 20, 1989 a Special Bulletin would issue naming the successful applicants under the Special

General Bid of December 4, 1989. That paragraph specifically provided that employees assigned to spareboards in Collective Agreement No. 2 would be identified in that bulletin. Paragraphs 7 and 8 of the Memorandum of Agreement provide as follows:

> **7.** Employees with four (4) or more years of seniority who have not been successful in obtaining a permanent position within his region and wishes to protect his Employment Security should make application to displace a junior employee in either Collective Agreement No. 1 or No. 2, as shown on the Special Bulletin and Special General Bid awards bulletin. Such applications must reach the respective bulletining office on or before December 29, 1989.
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> On January 3, 1990, the respective Corporate Officers will start to contact and/or advise the respective employees of assignments or displacements. On January 10, 1990, a second Special Bulletin and Special General Bid will be issued indicating the names and seniority of employees assigned to positions throughout the system.
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> **8.** Any vacancies existing after January 10, 1990, will be advertised in the usual manner under the terms of the respective Collective Agreement. In addition, a list of the names of the employees that will be considered on Employment Security effective January 15, 1990 will be made. As future vacancies arise that are available to these Employment Security employees, they will be called in reverse seniority order first from the region on which the vacancy exists and then from a system list.

It does not appear disputed that Paragraph 7 contemplated an exercise by which all employees with employment security should, by January 10, 1990 have taken all necessary steps to protect their employment security.

The dispute between the parties arises out of the application of Paragraph 8. A first point of contention is work which becomes available under the terms of Article 12.1 of Collective Agreement No. 1, which reads as follows:

> **12.1** Temporary vacancies, newly-created positions or seasonal positions, any of which are known to be of more than 90 calendar days' duration, and vacancies in permanent positions will be bulletined on the Region to the seniority group concerned.

Under the calling procedures adopted by the Corporation effective July 1, 1990 vacancies are advertised to the seniority group in question. Applications are received in the region consistent with the terms of Articles 12.3. By the terms of Article 12.12 the vacancy is to be awarded to the senior applicant with the qualifications required to perform the work. The dispute between the parties arises, however, because the Corporation maintains that Article 7 of the Supplemental Agreement and Paragraph 8 of the Memorandum of Agreement of November 19, 1989 supercede the terms of Article 12 of the Collective Agreement. Under the Corporation's calling procedures before a position is awarded under Article 12.12 a determination must be made as to whether the senior qualified applicant is senior to any qualified employee on employment security. The Corporation maintains that if the successful applicant is senior to any employee on employment security he or she is to be awarded the position. If, however, there are employees on the employment security list who are senior, they must be offered the vacant position to protect their employment security status. An employee on employment security status who is called and declines a vacant position is removed from the employment security list and reverts to lay off status. This procedure is applied system wide by the Corporation, in a manner which it maintains is consistent with the intention of Paragraph 8 of the Memorandum of Agreement of November 19, 1989.

The Brotherhood maintains that no employee on employment security can be called to fill a vacancy unless that vacancy continues to be unfilled after the exhaustion of the procedures for the bulletining and filling of positions found in Article 12 of the Collective Agreement.

I turn to consider the merits of these conflicting positions. The concept of employment security did not originate in the Memorandum of Agreement of November 19, 1989, nor under the terms of the Special Agreement of that date. It originated in 1985-86 in the provisions of the Supplemental Agreement governing Employment Security and Income Maintenance. Article 7 now provides, in part, as follows:

> **7.1** No technological, operational or organizational change, whether under this Employment Security and Income Maintenance Agreement or the Special Agreement, will be implemented if it would result in an employee having 4 or more years of service being laid off as a result.

> **7.2** In determining whether a change would result in the layoff of an employee with at least 4 years of service after exhausting seniority rights at his or her home station or terminal, the employee will be considered eligible for any work on the System, in both Collective Agreements No. 1 and No. 2, for which the employee is qualified or for which the employee can, in the judgement of the Corporation, become qualified within a reasonable period of time.
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> **7.3** An affected employee who transfers from one seniority group to another or from one collective agreement to the other under these Employment Security provisions, will transfer his or her full seniority to the new seniority group/collective agreement.
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> **7.4** A determination that a change can be made without resulting in the layoff of an employee with at least 4 years of service, using System seniority in both collective agreements, will not compel an employee to actually exercise his or her seniority on the System or from one collective agreement to the other. The option will be the employee's; however, failure of the employee to exercise his or her full option will not impede the Corporation from implementing the change.
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> **7.5** An employee who does not opt to exercise his or her full seniority will be eligible to take layoff under the terms of his or her collective agreement, and will be entitled to layoff benefits under this Employment Security and Income Maintenance Agreement or the Special Agreement, if he or she satisfies the eligibility provisions of the applicable agreement.
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> **7.6** An employee displaced by an employee exercising seniority under these Employment Security provisions, will, if otherwise qualified, also be entitled to these Employment Security provisions.

The protections gained for employees by the Brotherhood under the terms of the foregoing provision represent an extraordinary degree of job security. Employees with four or more years of service cannot be laid off as the result of an operational or organizational change such as was implemented by the Corporation on January 15, 1990. In exchange for that protection, which may arguably be the highest level of job security to be found in any collective bargaining regime in Canada, the employees affected must be prepared to protect any work on the system, in both collective agreements, as contemplated in Article 7.2.

An issue arising in these proceedings is the extent to which Paragraph 8 of the Memorandum of Agreement of November 19, 1989 has modified or amplified the provisions of Article 7.2 of the Supplemental Agreement. Intrinsic to that question is whether the calling procedures established by the Corporation are out of keeping with the procedure contemplated under Paragraph 8, and are in violation of Article 12 of the Collective Agreement.

The Brotherhood does not dispute that at some point in time employees on employment security can be called in reverse seniority order to fill vacancies on a system wide basis. What it disputes, however, is what constitutes "vacancies ... that are available to ... Employment Security employees" within the meaning of Paragraph 8. The Brotherhood's spokesperson submits that no vacancy can be considered available until all of the bulletining procedures under the terms of the Collective Agreement have been exhausted. In the result, therefore, in a given region a vacancy could be filled in accordance with the terms of the Collective Agreement by a junior laid off employee, with the result that a senior employee on employment security status, who is without any assignment and who remains on full salary and benefits, remains idle. That, however, is inconsistent with the established terms of the Supplemental Agreement, whereby employees who enjoy employment security status must opt to exercise their full seniority to protect that status, failing which they are subject to layoff. In the Arbitrator's view it would require clear and unequivocal language to establish that in the terms of Paragraph 8 the parties intended to depart so radically from the general principles governing the concept of employment security reflected in the terms of Article 7 of the Supplemental Agreement, the document which is the cornerstone of employment security. In my view the provisions of that paragraph are to be read harmoniously with the terms of the Supplemental Agreement as well as the terms of Article 12 of the Collective Agreement. Clearly, Paragraph 8 intends a procedure additional to and superceding the provisions of Article 12 of the Collective Agreement. That, in my view, is the conclusion most compellingly to be drawn from the language of Paragraph 8 of the Memorandum of Agreement, as well as from the overarching context of all of the above documents.

There is, moreover, a purposive dimension which casts serious doubt on the position advanced by the Brotherhood. According to the argument advanced by its representative, the intention of the Memorandum of

Agreement is that employees on employment security would be compelled to exercise their seniority to claim positions system wide, thereby displacing other employees, only on a one-time basis, in the General Bid of December 4, 1989. That view, however, is not supported by the language of Paragraph 8. The establishment of a system list for the filling of vacancies by employment security employees suggests a different intention. Paragraph 8 does modify the provisions of Article 7 of the Supplemental Agreement, to the extent that employment security employees are first to be called from the region where the vacancy exists, before any are called from elsewhere in the system, and are to be called in reverse seniority.

However, the general principle that vacancies are to be covered by employees who have the protections of employment security does not change. No violence is done to the Collective Agreement to the extent that the Corporation concedes that no vacancy can be filled by an employee on employment security if there is another qualified employee with greater seniority who could claim the vacancy by the normal operation of Article 12 of the Collective Agreement.

For the foregoing reasons the Arbitrator finds that the calling procedures adopted by the Corporation effective July 1, 1990 do not, to the extent discussed herein, violate the provisions of Article 12 of Collective Agreement No. 1.

The next point of dispute concerns the treatment of regular part-time assignments. By letter dated November 19, 1989 the parties agreed to the establishment of regular part-time assignments under the Special Bulletins of December 4, 1989. Those assignments were not to exceed thirty-two hours nor be less than twenty hours per week. Under the calling procedures effective July 1, 1990 the Corporation has provided that employees on employment security are compelled to take a vacant regular part-time assignment only at their home terminal. While employees on the region may be called in inverse seniority order to cover such a position, whether under Collective Agreement No. 1 or Collective Agreement No. 2, refusing to do so does not cause them to forfeit employment security.

Employees on employment security at the terminal, however, who fail to accept a regular part-time assignment at the terminal forfeit their employment security protection and go on layoff.

In the Arbitrator's view there is nothing contrary to the provisions of the Collective Agreement in the approach adopted by the Corporation in respect of the filling of regular part-time assignments at a terminal. In my view it is significant that the parties agreed to the establishment and posting of the regular part-time assignments as part of the Special Bulletins of December 4, 1989. That indicates their mutual intention to treat these positions in the same general manner as regular full-time positions for the purposes of the Memorandum of Agreement, the Special Agreement and the Supplemental Agreement.

There is, however, one aspect of this dispute which the Arbitrator must resolve in favour of the Brotherhood. While the Corporation takes the general position that employment security status will not be taken away from employees who fail to protect on a part-time position away from their home terminal, it "reserves the right" to require employees, under pain of losing their employment security, to cover regular part-time assignments elsewhere on the region in circumstances where it would otherwise be required to hire to fill a vacancy. The Arbitrator cannot sustain that position for reasons of estoppel. This aspect of the dispute is dealt with more fully in **CROA 2106**.

The next issue concerns the application of the calling procedures in respect of work under Article 12.6 of Collective Agreement No. 1 relating to temporary vacancies, new positions and seasonal positions known to be for ninety calendar days duration or less. The position of the Corporation is that the senior qualified employee on employment security at the terminal must take such a position subject to it being awarded to a more senior qualified applicant under the terms of Article 12.6 of the Collective Agreement. The position of the Corporation is that any employee on employment security who is senior to an applicant from the region is first to be offered the position.

The Arbitrator can find no violation of the terms of the Collective Agreement in that position, again bearing in mind that the Collective Agreement must be interpreted and applied subject to the provisions of the Supplemental Agreement, the Memorandum of Agreement and the Special Agreement. In particular, I accept the submission of the Corporation that the Memorandum of Agreement of November 19, 1989 addresses only permanent vacancies and does not, in any event, circumscribe the prerogative of the Corporation with respect to temporary vacancies under Article 12.6. To the extent that there may be any apparent conflict between the terms of Article 12.6 of the Collective Agreement and Article 7.2 of the Supplemental Agreement, the latter provision must prevail.

The final issue in dispute concerns the calling procedures touching on work under Article 12.7 of the Collective Agreement, which involves temporary vacancies of ten working days or less, and vacancies in positions pending occupancy by a successful applicant. Under the calling procedures instituted by the Corporation effective July 1, 1990 employees on employment security at the terminal where a temporary vacancy arises are called in seniority order, firstly from Collective Agreement No. 1 employees, and secondly from Collective Agreement No. 2 employees. The refusal to respond to such a call does not result in the forfeiture of employment security status, but rather in the deduction of earnings equivalent to the assignment refused, and the possibility of disciplinary action.

For the reasons related above in respect of the calling procedures dealing with vacancies under Article 12.6, the Arbitrator is satisfied that the calling procedures promulgated by the Corporation in respect of work falling under Article 12.7 of the Collective Agreement are consistent with the mutual intention of the parties as reflected in the Supplemental Agreement, and do not, therefore, violate the Collective Agreement, the Special Agreement or the Memorandum of Agreement of November 19, 1989.

In summary, subject to the qualification regarding the filling of regular part-time assignments dealt with in **CROA 2106**, the Arbitrator concludes that the calling procedures promulgated by the Corporation effective July 1, 1990 are consistent with the intention of the parties as expressed in Article 7 of the Supplemental Agreement and Paragraph 8 of the Memorandum of Agreement dated November 19, 1989. These agreements must be construed as qualifying the normal application of the Collective Agreement, and consequently the calling procedures, which are consistent with them, are not in violation of Collective Agreement No. 1.

February 15, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR