CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2089

Heard at Montreal, Thursday, 13 December 1990

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

DISPUTE:

Claim for a separate day for switching performed by Conductor W.R. Mitchell and crew.

JOINT STATEMENT OF ISSUE:

On January 14, 1990, Conductor Mitchell and crew were assigned to Train No. 75, Toronto to Windsor. The consist of their train was three locomotives, one steam generator unit and ten coaches. Upon arriving at Windsor, the crew was required to switch the equipment on their train resulting in the formation off two separate trains to operate at a subsequent date (Trains No. 74 and 76). The crew received additional compensation of one hour and thirty minutes for handling the excess equipment.

While the Union acknowledges that the crew was properly required to perform switching in connection with Train No. 74 which was the return movement of the crew on January 15, 1990, it maintains that the making up of Train No. 76 was not work in connection with Train No. 74. The Union therefore submits that the grievors ware entitled to not less than a minimum day for the performance of extra service pursuant to Article 9.4.

Given that the equipment switched was part of the train consist of Train No. 75, the Corporation maintains that such switching was in connection with their train and that the employees were properly compensated. Furthermore, the Corporation maintains that the additional compensation received for switching excess equipment was in accordance with a local agreement with the Union.

FOR THE UNION:

(SGD.) T. G. HODGES
GENERAL CHAIRPERSON

FOR THE CORPORATION:

(SGD.) P. J. THIVIERGE
FOR: DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:
K. Taylor – Senior Labour Relations Officer, Montreal

And on behalf of the Union:
M. Gregotski – Vice-General Chairman, St. Catharines

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, without controversy, that there is a local agreement between the parties in Windsor whereby on occasion, usually once a week, excess passenger equipment arriving from Toronto is put away and stored for future use by the crew of the incoming train. The fact situation giving rise to this case is, however, somewhat different. In the case at hand the crew of Train No. 75 were required, upon arrival in Windsor, to disassemble and switch their train so as to effectively marshall two trains into readiness for the following day.

The Union's brief relies on Article 9.5 of the Collective Agreement which provides as follows:

> **9.5** Employees called upon to do extra service between regular laid out day's trips, or out of turning point on trips paid on a continuous time basis, will be paid for such extra service not less than a minimum day at the schedule rate and under the conditions applicable to service performed; the time so occupied will be deducted in computing overtime.

The Corporation, on the other hand, asserts that the provisions of Article 7.5 govern in the situation at hand:

> **7.5** Employees required to report for duty, prior to the starting time of the crew as a unit or required to remain on duty after the crew as a unit has been released from duty to **perform special service**, (such as accompanying equipment between station and coach yard or roundhouse or baggagemen required to remain on duty to handle baggage, mail or express), **will be paid for such excess time so occupied on the minute basis** (each 3 minutes to count as 1 mile) and such time will not be included in computing overtime nor will it be used to make up the basic day or monthly guarantee. The provisions of this paragraph will apply to such service performed between regular trips by employees paid on a continuous time basis.
>
> (emphasis added)

The Corporation further relies upon the meaning of "special service" disclosed in Article 7.13 which is as follows:

> **7.13** Employees, including those in Road Switcher Service, who report for duty prior to, or remain on duty after, the crew as a unit has gone on/off duty to perform special service, such as:
>
> **(a)** where the crew is required to come on duty sooner than normally required to move cars from storage tracks to the station and heat the cars for some time before the train departs;
>
> **(b)** where one member of the crew is required to accompany a motor car or locomotive between a station, coach yard or yard, and the shoptrack;
>
> **(c)** **switching incidental to their own train, trip or regular assignment;**
>
> will be compensated for such service on the minute basis (each 4.8 minutes to count as one mile) and such time will not be used to make up the basic day. The provisions of paragraph 7.8 will also apply to employees covered by the provisions of this paragraph.
>
> (emphasis added)

The Corporation's position is that the grievors were not given a "call" within the contemplation of Article 9.4 of the Collective Agreement, but rather were called upon to perform special service incidental to their own regular assignment, and are thereby entitled to compensation under the terms of Article 7.

Needless to say, in the application of these provisions careful regard must be had to the facts of each particular case. Prior awards have established that work incidental to a train, such as putting away equipment on arrival, or wyeing a train and returning it to a station in readiness for its next trip does not constitute extra service within the contemplation of a provision such as Article 9.5 of the instant Collective Agreement. Rather, those circumstances have been found to fall within the concept of special service within articles such as 7.5, as being in relation to the employees' regular assignment or, as in the case of the locomotive engineers, work in connection with their train (*see **AD HOC Case No. 255** and **CROA 2067***).

In the Arbitrator's view, however, the instant case does not fall within those principles. What the grievors were called upon to do, in the unique circumstances which obtained on January 14, 1990, was not simply to wye their train, or put away their equipment. The grievors were required to work a relatively substantial period of time disassembling and switching their train, in order to create two separate trains, complete with motive power, and to

position those trains in preparation for their departure on the next day. In my view the work in question plainly went beyond switching incidental to their own train, trip or regular assignment within the meaning of Article 7.13(c) and did not fall within any other part of either that article or Article 7.5.

Nor am I persuaded by the argument of the Corporation that because the employees did not respond to a specific "call", but rather remained on duty following their regular assignment, that the claim cannot succeed. Article 9.4 addresses the circumstance of employees called for extra service. Article 9.5 is drafted in contemplation of the separate circumstance of employees already at work who are called upon to do extra service between regular laid out day's trips. That is what transpired in the instant case, and in my view Article 9.5 clearly applies.

The position argued by the Corporation is understandable, to the extent that at certain points of the grievance procedure the Union appears to have argued that the claim was entitled to succeed under the terms of Article 9.4. However, the original claim giving rise to this grievance was written up by the crew themselves as being "under Art. 9". That is the claim which has proceeded to arbitration, and I can see no reason to prevent the Union from placing the full terms of that article before me at this stage of the proceedings. In circumstances such as this it is substance, and not form, which should prevail.

For all of the foregoing reasons I am satisfied that the making up of the two trains was not work in connection with Train No. 74 and that the claim of the grievors, made under Article 9, is payable under the terms of Article 9.5. The grievance is therefore allowed.

December 14, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR