CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2095

Heard at Montreal, Wednesday, 9 January 1991

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

DISPUTE:

The recovery of maintenance of earnings payments made in error to Mr. E. Goral.

JOINT STATEMENT OF ISSUE:

On January 15, 1990, Mr. E. Goral was a Yard Helper at Toronto who was adversely affected by an Article "J" Notice served under the Special Agreement dated March 6, 1987. As a consequence, he was entitled to the maintenance of earnings benefits.

The Corporation inadvertently calculated his maintenance of earnings based on the formula governing road service employees. Consequently, Mr. Goral was overpaid a total of $6,912.73.

It is the Union's position that the original maintenance of earnings estimate must be honoured and that the Corporation's recovery of the funds is improper.

It is the Corporation's position that the initial calculation of Mr. Goral's maintenance of earnings was not in accordance with the terms of the Special Agreement and that Mr. Goral must repay monies paid to him in error. Further, the Union has failed to show that there has been any violation of the Collective Agreement.

FOR THE UNION:	FOR THE CORPORATION:
(SGD.) W. G. SCARROW	(SGD.) C. C. MUGGERIDGE
GENERAL CHAIRPERSON	DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

K. Taylor	– Senior Advisor, Labour Relations, Montreal
C. Grenier	– Officer, Special Duties, Montreal

And on behalf of the Union:

W. G. Scarrow	– General Chairperson, Sarnia
G. Binsfeld	– Secretary/Treasurer, UTU, St. Catharines

AWARD OF THE ARBITRATOR

It is common ground that Mr. Goral was an employee adversely impacted by the introduction of the reduced passenger train schedule effective January 15, 1990. He was therefore entitled to the benefits of the Special Agreement dated March 6, 1987, including the right of incumbency rates as provided therein. In February of 1990 he was advised that his maintenance of earnings for a twenty-eight day period was $4,905.80. This was in error, and Mr. Goral was so advised in a letter from the Corporation dated May 10, 1990. That letter asked him to repay the excess already received by him, then in the amount of $4,664.67 by means of a personal cheque, or alternatively to make arrangements for deduction of the overages from his regular pay cheques. It does not appear disputed that yet another overpayment was made to Mr. Goral, resulting in an accumulation of $6,912.73 of payments to him in error.

As the grievor failed to respond to the Corporation's letter of May 10, 1990, the employer proceeded unilaterally to deduct 25% of his gross earnings per pay to recover the monies in question. While precise figures are not available, it appears that the process of recovery is at this time at or close to the point of completion. The issue is whether the Corporation was entitled to unilaterally recover the full amount of the overpayments made to Mr. Goral in the circumstances disclosed.

Arbitral jurisprudence has dealt extensively with the rights of employers in this regard. It has generally been held that when an employer makes an overpayment of wages or benefits to an employee as a result of a mistake of fact it is entitled, as a general rule, to recover the sums so paid. That principle is qualified, however, by the general rule of estoppel. If it can be shown that the employee acted in reliance on the mistake of the employer, and materially changed his or her position in a way that would render the correction of the error prejudicial, the employer may be estopped from recovering the amounts paid in error.

Both the common law and the arbitral jurisprudence in this regard were extensively reviewed in **Re Ottawa Board of Education and Federation of Women Teachers Associations** (1986) 25 L.A.C. (3d) 146 (P.C. Picher). In that case it was held that the Board of Education could not recover certain sums paid in error to a teacher, where it was shown that the employee changed her financial circumstances and incurred certain expenses in reliance on the employer's error. The general principle of estoppel in such cases was described in the following terms:

> In *Rural Municipality of Storthoaks* the Supreme Court stated that the mere spending of money would not be sufficient to establish a material change of circumstance. It indicated, on the other hand, that the taking on of special projects or special financial commitments as a result of the receipt of an overpayment of money would be. The way this defence was referred to in *United Overseas Bank v. Jimani,* (1977) 1 All E.R. 733, in the context of estoppel was that the recipient of the overpayment must show that because of his mistaken belief that he was entitled to the larger amount of money, he changed his position in a way which would make it inequitable to require him to repay the money. At least part of the inequity was referred to, in a general way, in the earliest reported cases on the subject and stems from an understanding that people typically gear their standard of living to their level of income and that to require a person to repay money he thought was his would create a substantial hardship, particularly if on the strength of the higher sum, he materially changed his position.

The Union in the instant case pleads three instances of purported changes of position on the part of the grievor. Firstly it cites the costs which he incurred by retaining legal counsel to conduct litigation in relation to a malpractice suit brought in the name of his wife. Secondly it cites the expenditure of $3,500.00 to purchase a new colour television set. Lastly, it argues that the mistake of the Corporation in advising Mr. Goral of his incumbency rate in February of 1990 induced the grievor into serious error when, at the change of timetable in the spring of 1990 he was called upon to make a final choice with respect to whether he would return to work for the Canadian National Railway Co., or remain a permanent employee with VIA Rail. It is common ground that as an employee subject to the terms of the Special Agreement governing the transfer of employees from CN to VIA Rail Mr. Goral had the right to transfer back to CN at any of the first five changes of timetable after his transfer. His fifth and final opportunity came in April of 1990, when he was under the mistaken impression that his incumbency with VIA Rail would guarantee him a minimum of approximately $60,000.00 a year. In fact, unbeknownst to the grievor, his correct incumbency rate was $2,552.94 per 28-day period, or less than half of the wage guarantee that he believed that he had with VIA Rail.

The Union argues that Mr. Goral would not have elected to remain in the employment of VIA Rail at the change of timetable in April of 1990 had the true value of his incumbency been communicated to him. It is not disputed that he would have been in a position to have higher earnings in the service of CN, largely because of the greater frequency of work opportunities with that company. That would not necessarily have been true, however, had Mr. Goral been entitled to an annual wage guarantee with VIA of some $60,000.00, as had previously been represented to him by the Corporation.

In these circumstances the Arbitrator is satisfied that the choice made by Mr. Goral to forego the opportunity to return to service with CN, where he would have had an opportunity for higher earnings, was clearly influenced by the Corporation's mistake, communicated to him in February of 1990, with respect to the amount of his wage incumbency protection. It is not disputed that that decision was in effect an expense to him, in that he lost the opportunity of greater future earnings. The Arbitrator is not, however, satisfied that either the litigation, which was undertaken prior to the Corporation's notice of incumbency given to the grievor, or the purchase of his television set has been demonstrated to be in reliance on the Corporation's error. Those findings are relatively immaterial, however, as I am satisfied that Mr. Goral's decision to forego his right to return to CN and to remain with VIA Rail was critically influenced by the Corporation's mistaken representation respecting the amount of his incumbency. Had he known his true rate of incumbency he would not have forfeited his opportunity to go back to a more lucrative working opportunity at CN.

The issue then becomes to what extent the Corporation is estopped from recovering the amounts paid in error to Mr. Goral. The material before the Arbitrator reveals without contradiction that as of May 10, 1990 the grievor was put on notice by the Corporation that an error had been made in respect of the calculation and payment of his maintenance of earnings. The letter sent to him on that date clearly advised him that his maintenance of earnings for a 28-day period was in fact $2,552.94, and that he had been overpaid to that point in the amount of $4,664.67. Thereafter, by a repetition of the same clerical error, he was overpaid by a further $2,248.06.

In the Arbitrator's view the grievor cannot complain or raise an estoppel in respect of the Corporation's right to recover the latter sum of $2,248.06. Those monies were paid to him after he was notified of the error in respect of the calculation of his maintenance of earnings, and when he received them he knew, or reasonably should have known, that they were paid to him in error. In the Arbitrator's view the grievor cannot assert in those circumstances that he still proceeded in unwitting reliance on the Corporation's error previously communicated to him. In the Arbitrator's view to allow the grievor to retain those funds would

The same cannot be said, however, with respect to the sum of $4,664.67 which the grievor received in all innocence, both before and after he had relied on the Corporation's misrepresentation to forego the opportunity to return to higher paid employment with CN. In the Arbitrator's view those monies fall within the principle of estoppel described above, and it would be inequitable for the Corporation to recover them in the circumstances.

For the foregoing reasons the grievance is allowed in part. The Corporation is directed to repay forthwith to the grievor the sum of $4,664.67.

By way of further remedy the Union has requested that the Arbitrator direct the Corporation to provide to Mr. Goral the opportunity to transfer to the employment of CN. In light of the case presented to the Arbitrator on the basis of the Joint Statement of Issue, and given further that the other railway company has not been made a party to these proceedings, that remedy falls beyond the scope of this grievance. Needless to say, however, the instant award is without prejudice to such right as the grievor may have in relation to the application of the Special Agreement in his particular circumstances.

January 11, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR