CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2141

Heard at Montreal, Tuesday, 14 May 1991

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The number of hours to be included in the guarantee of Mr. C. Carrier established under Maintenance of Earnings.

JOINT STATEMENT OF ISSUE:

The grievor, Mr. C. Carrier, was on sick leave from April 15, 1989, to February 21, 1990. Upon his return to work, he was entitled to Maintenance of Earnings protection under Article E of the Special Agreement.

In pay periods 3, 4 and 5, he was paid as if he had a guarantee of 160 hours for 4-week period. The Corporation then reduced his guarantee to 144 hours based on a reassessment of Mr. Carrier's earnings prior to the service reductions of January 15, 1990.

The Brotherhood contends that the Corporation has violated Article 7 of the Supplemental Agreement and Article 4.1 of Collective Agreement No. 2. The Brotherhood believes Mr. Carrier's guarantee should be 160 hours per 4-week period and that it was unfair to determine his average earnings by using one of the slowest traffic periods of the year.

The Corporation maintains that Mr. Carrier was over-compensated in pay periods 3, 4 and 5, and that his guarantee was correctly readjusted to 144 hours based on his actual earnings for the 4-week period immediately prior to his sick leave.

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

There appeared on behalf of the Corporation:

C. Pollock	– Senior Officer, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
J. Kish	– Senior Advisor, Labour Relations, Customer Service, Montreal
D. Wolk	– Manager, Customer Services, Winnipeg
P. Hughes	– Observer

And on behalf of the Brotherhood:

R. J. Stevens	– Regional Vice-President, Toronto
A. Cerilli	– Regional Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

The sole issue raised in this grievance is the method by which the maintenance of earnings protection of Mr. C. Carrier is to be calculated. The Brotherhood submits that during negotiations for the Special Agreement in relation to the service reductions of January 15, 1990 it was agreed that for the purposes of employment security spareboard employees would be classified as a full-time position. On that basis it submits that Article 4.1 should apply, whereby employees in assigned service are employed on the basis of a forty-hour week and a 160-hour guarantee. This, the Brotherhood's representative submits, was the understanding reached between the parties in the negotiation of the Special Agreement.

The documentary evidence before the Arbitrator leaves that position in some doubt. In anticipation of the General Bid for Collective Agreement No. 2 the Corporation negotiated with the Brotherhood and, ultimately, issued instructions to the attention of employees. The instructions issued in respect of spareboard assignments read, in part, as follows:

> Spareboards, for the purposes of Employment Security only, will be considered as regular full-time assignments.
> Employees who were not awarded a full-time position as a result of the December 4, 1989, General Bid will be assigned in seniority order to spareboards as required.
> . . .
> Earnings protection for Employment Security Employees assigned to Spareboards will be as follows:
> 1. If an employee came from a regular assignment to the spareboard as a result of the change, such employee would be entitled to the same earnings he had on his last assignment.
> 2. An employee who is presently on the spareboard and remains on the spareboard effective January 15, 1990, would be entitled to his last four week average period (December 8, 1989 -- January 4, 1990) with a minimum of 144 hours and a maximum of 160 hours. If employee was reduced in classification of board then the higher rate of pay will be protected providing the employee protects the highest rated position available to him.

It is common ground that Mr. Carrier would fall under sub-paragraph 2 above, having been an employee on the spareboard effective January 15, 1990. However, because he was on sick leave from April 15, 1989 to January 21, 1990 he was not in a position to receive earnings during the four week average period between December 8, 1989 and January 4, 1990.

The evidence of the communication between the parties, however, during the course of their discussions concerning the implementation of the Special Agreement indicates that they turned their minds to the entitlement of persons in the position of the grievor. On December 11, 1989 the Corporation's Manager of Labour Relations wrote to the Brotherhood's spokesperson in Special Agreement negotiations a letter relating to the clarification of the Special Agreement as discussed between the parties. It reads, in part, as follows:

> This has reference to our various telephone conversations, meetings, etc. relative to the application, interpretation or clarification of the new Special Agreement, Memorandum of Agreement, etc. The following is a list of the majority of the points discussed.
> ...
> **8.** SPAREBOARDS FOR COLLECTIVE AGREEMENT NO. 2.
> ...
> **e)** Earnings Protection for Employment Security Employees assigned to Spareboard.
> **i)** Employee came from a regular run. Such employee would be entitled to the compensation of his last assignment.
> **ii) Employee was on Spareboard and remains on Spareboard.**
> **Such employee would be entitled to his last four week average with a minimum of 144 hours and a maximum of 160 hours. If employee was reduced in classification of board then the higher rate of pay will be protected providing the employee protects the highest rate available to him.**
>
> (emphasis added)

The record indicates, beyond controversy, that the above statement of the application of earnings protection for employment security employees assigned to the spareboard was not objected to or grieved by the Brotherhood until the instant grievance was lodged on April 24, 1990.

The negotiation of the Special Agreement and the clarification of the application of its terms in advance of its implementation was a matter of great importance to both the Corporation and the Brotherhood. The letter from the Corporation's Manager of Labour Relations to the Brotherhood's spokesperson on December 11, 1989 was of obvious significance to both parties as it was contemporaneous with the Special General Bulletin posted December 4, 1989 and prior to the job awards posted on the Award Bulletin of December 20, 1989.

The language of the communication from the Corporation to the Brotherhood's spokesperson, particularly as reflected in sub-paragraph 8(e)(ii), as regards the maintenance of earnings protection of employees who were on the spareboard and remain on the spareboard would clearly support the position taken in these proceedings by the Corporation. Under the terms of that provision an employee is entitled to his or her last four-week average, with a minimum of 144 hours and a maximum of 160 hours. It is common ground that the last four-week average of earnings for Mr. Carrier was below the minimum of 144 hours.

In the Arbitrator's view, in the circumstances surrounding the application of the Special Agreement, if the Brotherhood was in disagreement with the terms of implementation contained in the letter from the Corporation on December 11, 1989 it was incumbent upon it to so advise the Corporation. Absent any such objection or protest, I am satisfied that the Brotherhood must be taken to have acquiesced in the formula put forward by the Corporation.

That, moreover, appears to be supported by the content of the instructions issued to employees by the Corporation, again without objection by the Brotherhood. Paragraph 2 of that document advises employees that they are entitled to their last four-week average period between December 8, 1989 and January 4, 1990, with a minimum of 144 hours and a maximum of 160 hours. There is, plainly on the face of that document, no guarantee of 160 hours based on an extrapolation from Article 7 of the Supplemental Agreement and Article 4.1 of the collective agreement. While it appears that during the weeks in question most employees in spareboard service earned the maximum of 160 hours, there is nothing in principle to have prevented them having reduced earnings to the minimum of 144 hours.

The thrust of the Brotherhood's grievance is that the grievor's lot is unfair because he was not at work during the four weeks in question. The Brotherhood, however, has been unable to refer the Arbitrator to any provision of the Special Agreement, the Supplemental Agreement or the Collective Agreement which would entitle the grievor to the guarantee of the 160 hours claimed. Absent any clear and unequivocal language to support the conclusion it seeks, and particularly given the contrary language of communication between the parties as reflected in the Corporation's letter, the Brotherhood's position cannot be accepted.

For the foregoing reasons the grievance must be dismissed.

17 May 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR