CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2148

Heard at Montreal, Thursday, 16 May 1991

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The disqualification of Ms. L. Gaudet from the position of Counter Sales Agent/Station Services Agent.

JOINT STATEMENT OF ISSUE:

Following the special general bid held in anticipation of the January 15, 1990 implementation of the Article J notice, Ms. Gaudet was awarded the position of Counter Sales Agent/Station Services Agent. She was given a formal Corporation sponsored training course from January 29 to February 16, 1990.

The Brotherhood contends that a reasonable period of time was not afforded the grievor to train and become qualified on the position. The Brotherhood alleges that the Corporation has violated Article 12.16 and Article 16 of Collective Agreement No. 1, and Article C of the Special Agreement.

The Brotherhood seeks to have the grievor awarded the position in question or, failing that, she should be granted full employment security benefits.

The Corporation maintains that the grievor was disqualified by virtue of Article 12.16, in that she failed to demonstrate her ability to perform the work. The Corporation also rejected the claims for training under Article C of the Special Agreement or for employment security, as she was not adversely affected by the Article J notice being implemented.

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:

D. Fisher	– Senior Officer, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
S. Steeves	– Manager, T.S.O., Moncton
D. Hébert	– Training Instructor, Moncton
P. Hughes	– Observer

And on behalf of the Brotherhood:

T. A. Barrons	– Representative, Moncton
G. T. Murray	– Regional Vice-President, Moncton
L. M. Gaudet	– Grievor

AWARD OF THE ARBITRATOR

Upon a review of the material filed the Arbitrator is satisfied that the grievor cannot be viewed as an employee adversely affected by the Article J notice as contemplated within the Special Agreement. It is common ground that the grievor was placed on laid-off status effective October 17, 1989 and was recalled to work on an "as required" basis thereafter. On December 14, 1989 she was awarded a temporary position of stock attendant under Article 12.6, which position was terminated on January 10, 1990. On January 11 she displaced into a temporary vacancy under Article 12.7, and continued to work in the same capacity on January 13 and 14, replacing an employee who was filling in for another on sick leave.

The Brotherhood seeks to rely, in part, on a comment made in a secondary fashion in the disposition of **CROA 2116**, wherein it was suggested that employees serving as short term replacements might be entitled to the protections of the Article J notice which took effect on January 15, 1990. It should be stressed that the issue there under consideration concerned the case of an employee who was on sick leave on January 15, 1990 whose claim to employment security status was made on the basis that employees junior to himself were at work on that date. That grievance did not involve elaborate argument on or consideration of the merits of the entitlement of employees on temporary assignments under Article 12.7 to the protections of an Article J notice.

That issue was, however, fully considered in the decision of Arbitrator Weatherill in **Ad Hoc Award No. 126** which involved the application of the Special Agreement under the Railway Passenger Services Adjustment Assistance Regulations between Canadian Pacific Limited and the United Transportation Union. In considering the language of the Special Agreement in that case, which is substantially similar to the Special Agreement in the case at hand, the Arbitrator made the following comments at p.11:

> . . . The cases of those whose positions were abolished and who were unable to hold other jobs are clear, as are the cases of those displaced by the exercise of seniority in such circumstances. It is, however, not clear that persons who did not hold regular positions should be said to be "adversely affected" within the meaning of the Special Agreement, where the effect of their work or earnings is only indirect. While, in a general way, such persons may appear to be "affected" by the change (as, in a general way, were many others), they do not, in my view, come within the class of those contemplated by the Special Agreement as entitled to benefits.

In the Arbitrator's view the foregoing reasoning applies equally in the instant case. A review of the terms of the instant Special Agreement negotiated between the Brotherhood and the Corporation gives a clear indication of the parties' understanding of which employees would be viewed as adversely affected within the meaning of Article J of the agreement. Repeatedly the various benefits described within the agreement are said to be available to employees whose positions are abolished due to the Article J notice or who are displaced by a senior employee (see, e.g., Articles A.1, A.2, C.1, E.1 and G.1).

In the instant case the evidence establishes that Ms. Gaudet was not able to hold regular work prior to January 15, 1990. She did not hold a position which was abolished nor was she displaced as a result of the Article J notice. While it may be, as the Brotherhood submits, that she was not at the time a part-time employee within the contemplation of Article 12.7(a) and therefore did not fall within the class of employees excluded from the provisions of the Supplemental Agreement which governs employment security (see Article 11.1) (an issue on which I make no finding), I am satisfied that in the circumstances she must, for the reasons reflected in the award of Arbitrator Weatherill, be found to be an employee who was not adversely affected by the Article J notice within the intended meaning of that phrase contemplated by the Special Agreement.

The second issue to be considered is the merit of the Brotherhood's contention that the grievor was deprived of the right to demonstrate her ability to perform the work of the counter sales agent/station services agent position, in accordance with Article 12.16 of the collective agreement. That provision is as follows:

> **12.16** An employee, who is assigned to a position by bulletin, will receive a full explanation of the duties of the position and must demonstrate his ability to perform the work within a reasonable probationary period up to 30 working days, the length of time dependent upon the character of the work. Any extension of time beyond 30 working days shall be locally arranged. Failing to demonstrate his ability to do the work, he shall be returned to his former position without loss of seniority and the employee so displaced will be allowed to exercise his seniority. When an

> employee who has been assigned to a position by bulletin fails to demonstrate his ability to perform the work, the position will be rebulletined.

The evidence before the Arbitrator establishes beyond controversy that Ms. Gaudet was awarded the position of counter sales agent/station services agent pursuant to the general bid held in anticipation of the January 15, 1990 reductions in service. The evidence further reveals that she was given some two weeks' training in the operation of the ReserVIA computerized ticket reservation system. While she had some initial difficulty with this course, she did complete the technical aspects with a 97% score on her test. The evidence reveals, however, that she displayed some difficulty in handling problems during telephone contact with customers. It is common ground, however, that she was not awarded and was not being trained for a telephone sales agent's position, as she had successfully bid on a counter sales agent's position.

The Corporation takes the position that the Counter Sales Agent position was awarded to Ms. Gaudet pursuant to the bulletin, but that the award was conditional upon her being able to qualify by successful completion of a training course in the duties of a counter sales agent. It maintains that she was disqualified from the position when, in the opinion of Training Officer Don Hébert, she was found to have insufficient ability in handling telephone calls, and it was concluded that she could not be assigned to work alone.

The Arbitrator has some difficulty with the Corporation's submission in this regard. Firstly, it is common ground that as a counter sales agent Ms. Gaudet would be called upon to have very limited contact, if any, with clients by telephone. Secondly, as a counter sales agent she would not work alone. On the whole, in these circumstances, I cannot find that the Corporation has established, on the balance of probabilities, that Ms. Gaudet was not entitled to be given an opportunity to demonstrate her ability to perform work of counter sales agent within a reasonable probationary period as contemplated under Article 12.16 upon her completion of the two-week training course. While my conclusions might be otherwise if the position awarded to her had been that of a telephone sales agent, I am not satisfied that the same conclusion can be justified with respect to the grievor's potential to establish her ability to perform the work of a counter sales agent. It should be stressed that the Arbitrator's conclusion in this regard should not be taken as confirmation that Ms. Gaudet will or will not succeed in demonstrating her ability in a counter sales agent position. The finding in this award is limited to the conclusion that she demonstrated sufficient technical competence at the conclusion of her training period so that, having been assigned the position by bulletin, she was entitled to the opportunity to demonstrate her ability under the terms of Article 12.16 of the collective agreement. While I am satisfied that Mr. Hébert's judgement was at all times exercised in the best of good faith, I am persuaded that he did not fairly consider whether Ms. Gaudet could, over a reasonable trial period, perform the arguably less stressful tasks of a counter sales agent, as opposed to those of a telephone sales agent, in a setting where she would not have to function alone.

For the foregoing reasons the Arbitrator finds that the Corporation deprived the grievor of the opportunity to demonstrate her ability to perform the work of counter sales agent, contrary to the terms of Article 12.16 of the collective agreement. Ms. Gaudet shall therefore be restored forthwith into her position of counter sales agent/station services agent, after a reasonable opportunity of refamiliarization, the nature and duration of which shall be determined by agreement between the parties. In the circumstances it appears to the Arbitrator that any order in respect of compensation would be premature. It appears to me that if the grievor should ultimately prove unable to perform the functions of the counter sales agent's job after a reasonable trial period, there would be no basis upon which to conclude that the Corporation's initial treatment of her in fact deprived her of any wages or benefits. If, on the other hand, she should prove successful in demonstrating her ability, it must be concluded that in fact she would have been equally successful at the conclusion of her training course of February of 1990, and in that event she would be entitled to compensation for all wages and benefits lost in the interim.

For the foregoing reasons, and subject to the qualifications described, the grievance is allowed.

17 May 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR