

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2169

Heard at Montreal, Wednesday, 10 July 1991

concerning

**VIA RAIL CANADA INC.**

and

**CANADIAN BROTHERHOOD OF RAILWAY,  
TRANSPORT AND GENERAL WORKERS**

**EX PARTE**

### **DISPUTE:**

The Corporation served an Article 8 notice under the Supplemental Agreement to the CBRT&GW abolishing 38 Service Manager positions. The Corporation, coincidentally, will create non-union positions titled "Manager, Guest Services", to replace the Service Managers and to perform their work for the on-board services.

### **BROTHERHOOD'S STATEMENT OF ISSUE:**

Article 8 notices were issued abolishing five Service Manager positions in VIA Ontario, ten positions in VIA West and 23 in VIA Quebec.

The Brotherhood contends that the Corporation violated Articles 1.1(c) and (e), 2.1, 4.17(b), 5.1 and 5.2, 12, 23(1) and (2), and Appendices 2, 3, 8 and 9 of Collective Agreement No. 2 when the above positions were abolished.

The Brotherhood further contends that the new management position of "Manager, Guest Services", will be performing the functions of the Service Manager positions and that the Article 8 notice was improperly served, as they do not consider the abolishment of the Service Manager positions and the introduction of non-union positions to perform Service Managers' work as coming within the scope of a technological, operational or organizational change.

The Corporation denies any violation of the Collective Agreement and maintains that the notices were correctly served under Article 8 of the Supplemental Agreement.

### **FOR THE BROTHERHOOD:**

**(SGD.) T. MCGRATH**  
**NATIONAL VICE-PRESIDENT**

There appeared on behalf of the Corporation:

M. St-Jules	– Senior Negotiator & Advisor, Labour Relations, Montreal
P. J. Thivierge	– Senior Negotiator & Advisor, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
D. Fisher	– Senior Officer, Labour Relations, Montreal
J. Kish	– Senior Advisor, Labour Relations Officer, Customer Services, Montreal
J. Callaghan	– Project Manager, Customer Services, Montreal

E. Mouré – Assistant Project Manager, Customer Services, Montreal  
 N. Lenoir – Regional Director, Customer Services, Montreal  
 C. Gordon – Supervisor, On-Board Services, Montreal

And on behalf of the Brotherhood:

A. Cerilli – Regional Vice-President, Winnipeg  
 T. McGrath – National Vice-President, Ottawa  
 T. N. Stol – National Vice-President, Ottawa  
 G. T. Murray – Regional Vice-President, Moncton  
 R. J. Stevens – Regional Vice-President, Toronto  
 K. Sing – Local Chairperson, Halifax  
 T. Della Passa – Local Chairperson, Montreal  
 L. P. Rousseau – Recording Secretary, Montreal  
 K. Cameron – Witness  
 L. Savoi – Witness  
 H. Adams – Witness

And on behalf of the United Transportation Union:

D. Wray – Counsel, Toronto  
 T. G. Hodges – General Chairperson, UTU, St. Catharines  
 R. Lebel – General Chairperson, UTU, Quebec

### **AWARD OF THE ARBITRATOR**

This grievance concerns an Article 8 notice served on the Brotherhood on or about March 15, 1991 advising the Brotherhood of the abolishment of some thirty-eight Service Manager positions in On-Board Services. The abolishment of the positions is contemporaneous with the introduction of a new management position entitled “Manager, Guest Services”. The Brotherhood maintains that the abolishment of the Service Manager’s positions to permit the establishment of the new management position violates the collective agreement, to the extent that the duties and responsibilities of the new position encompass virtually all of the duties and responsibilities previously discharged by Service Managers within the bargaining unit.

A preliminary issue arose with respect to the standing of the United Transportation Union to intervene in this grievance. At the hearing its counsel was allowed to speak to that issue, as were the parties. The United Transportation Union maintains that the job description for the newly established position of Manager, Guest Services is such as to bring that position within its bargaining unit of running trades operating crews. In essence, its counsel submits that the duties assigned to the newly established position involve duties and responsibilities normally performed by conductors and assistant conductors within the UTU bargaining unit. On that basis he maintains that the Arbitrator should exercise his discretion to adjourn this proceeding and refer the matter, which he characterizes as being in the nature of a jurisdictional dispute, to the Canada Labour Relations Board under Section 65 of the **Canada Labour Code**.

Alternatively, he submits that this hearing should be adjourned because the United Transportation Union, which is presently a participant in Section 18 proceedings before the Canada Labour Relations Board has filed a reply which, in part, maintains that any adjustment of the certificates or bargaining units directed by the Canada Labour Relations Board should include the assignment of the position “Manager, Guest Services” to the United Transportation Union (or, presumably, to the union which is successful in any representation vote conducted by the Board governing the bargaining rights of running trades employees).

The Arbitrator considered the merits of the submissions made by counsel for the United Transportation Union as well as the opposing motions of both the Brotherhood and the Corporation. At the hearing I ruled that the balance of interests does not suggest that the Arbitrator should exercise his discretion to refer this matter to the Canada Labour Relations Board in the circumstances of this case. It is clear to me, on a review of the job description for the proposed new position of Manager, Guest Services that any connection between that position and the work traditionally performed by members of the United Transportation Union is so remote as to fall short of establishing a *prima facie* case for that union’s claim.

While it is clear that the proposed position would involve the supervision of operating crews, as well as On-Board Services employees and, to some extent, station attendants and other employees of the Corporation, there is little or no substance to the Union's claim that the job description would involve tasks which are the traditional or exclusive work jurisdiction of members of the United Transportation Union. Indications within the description of the main duties of the position that the Manager, Guest Services will deal with car defect sheets as well as health and sanitation standards do not, in my view, on their face bring this position colourably within the jurisdiction of the United Transportation Union. Firstly, it is not disputed before me that employees in a number of bargaining units are responsible for safety and health concerns and the reporting of car defects. Secondly, the principal thrust of the document reveals that the great preponderance of the responsibility of the new position is in respect of the planning and supervision of On-Board customer services, which does not differ substantially from the existing responsibilities of the Service Manager falling within the bargaining unit of the Brotherhood. Additionally, the Arbitrator is satisfied that the interests of the Union may well be protected insofar as it is presently party to a Section 18 application before the Canada Labour Relations Board. In those proceedings it is making a claim for the inclusion of the new position within any bargaining unit including running trades which might result from the Board's order. In the result, therefore, the Arbitrator is persuaded that the prejudice to the Brotherhood and the Corporation in adjourning these proceedings for an indefinite period would far outweigh any justifiable interest of the United Transportation Union. For these reasons the Arbitrator dismissed the Union's claim for standing at the hearing, and proceeded to hear the merits of the grievance.

While the evidence before the Arbitrator, both documentary and *viva voce*, is considerable, the issue and the facts critical to the resolution to this grievance can be stated in relatively simple terms. Well established jurisprudence holds that an employer cannot abolish a bargaining unit position and purport to assign the same duties and responsibilities as were performed by employees in the abolished position, and little else, to other employees or managerial staff who are outside the bargaining unit. That principle generally flows from a recognition that the scope clause of a collective agreement recognizes the right of the union to represent, for collective bargaining purposes, those persons who perform work which is normally, regularly and substantially assigned to employees within the bargaining unit. In this case the Brotherhood maintains that that is precisely what has transpired. It argues that the Corporation has taken virtually all of the responsibilities of Service Managers, abolished their jobs, and placed the same work in the hands of the Manager, Guest Services, with the addition of certain management functions which in fact reflect a relatively small proportion of the duties of the new job. If it is correct in that assertion, it is entitled to a declaration that the Corporation has violated the collective agreement by serving an Article 8 notice abolishing the position of Service Manager as part of its decision to implement the newly established position of Manager, Guest Services.

Before addressing the evidence, it is useful to reflect on the arbitral principles stated by Canadian arbitrators, including arbitrators in this Office. An extensive line of reported arbitrations in Canada confirms the basic proposition relied upon by the Brotherhood in this grievance. One of the earliest cases to deal with the principle was a decision of then Professor Laskin in **Re International Association of Machinist, Lodge 717 and Hawker Siddeley of Canada Ltd.** (1963) 14 L.A.C. 197. At pp. 197-8 he made the following observations:

... The broader ground for allowing the grievance does not involve any reliance on recall but rests on a duty to maintain the integrity of the collective agreement. In the particular case at hand, this means that work comprehended in the job classifications covered by the agreement must, when available in the plant, be assigned according to the terms of the agreement. On this view, the board is not concerned here with contracting out in any general sense, nor is it saying that the company may not discontinue operations or abandon certain types of work.

In his decision in **Re United Steel Workers of America, Local 1817 and Fittings Ltd.** (1969), 20 L.A.C. 249, Arbitrator Weatherill relied on the foregoing passage to disallow the initiative of an employer. In that case the Board struck down the employer's attempt to assign certain in-plant mail delivery traditionally done by a member of the factory clerical bargaining unit to a non-bargaining unit person employed in its office. In allowing the grievance Arbitrator Weatherill commented, in part, at p. 256:

... there appears to be no answer to the argument that work comprehended by the job classifications covered by the agreement must, when available in the plant (that is, when required by the company to be done by an employee) be assigned according to the terms of the agreement.

One of the obvious concerns of boards of arbitration from the earliest days has been to avoid the erosion of a bargaining unit by the purported exercise of management's discretion to reassign work. In **United Steel Workers of America, Local 3684, in Re Standard Sanitary and Dominion Radiator Ltd.**, (1954), 5 L.A.C. 1684, the arbitrator, Mr. Justice W.D. Roach, ruled that the company could not reassign the work of a piece-work rated employee to that of salaried employees doing the same work. At p. 1689 of the award he made the following comments:

If the Company could change this particular job to a salaried job, then it seems to me that it would necessarily follow that it could change all the hourly or piece-work employees to salaried employees doing the same work and thus completely destroy the effect of the Agreement. The Union would then be the collective bargaining agent with no employees for whom to bargain. I put that proposition to Mr. Delamere during argument and he replied that if the Company changed all the hourly rated employees to salaried employees they would be acting in bad faith; but there the Company was acting in good faith and could change this job from an hourly rated job to a salaried job because it was necessary to do so. In my opinion neither the good faith of the Company nor the element of necessity, if it existed, permits the Company to do something that is contrary to the very essence of the Agreement. Moreover, it has not been demonstrated that the job Harrison is doing must necessarily be a salaried job. It seems to me that the difficulties which the Company sought to overcome could be effectively overcome by making the job an hourly rated one.

The issue of the erosion of a bargaining unit by the assignment of bargaining unit work to management was more directly addressed in the arbitration award of Mr. O.B. Shime in **Re Ontario Hydro and Canadian Union of Operating Engineers, Local 1110**, (1976), 12 L.A.C. (2d) 143. In that case the union complained that the employer had removed four crew foremen, whose work was contained within the bargaining unit, and eliminated their positions by promoting the four incumbents to positions of management foremen, while they still continued to exercise the same general responsibilities. In that case a prior complaint made by the union to the Ontario Labour Relations Board resulted in a finding that the newly established positions were managerial within the meaning of the Labour Relations Act, with the board stressing in its decision that it made no determination as to what the rights of the parties would be under the collective agreement. In a succinct summary of the principles governing this area of arbitration law, Arbitrator Shime expressed the following observations and conclusions at pp. 145-47:

Thus, bearing in mind the distinction between the scope of the Ontario Labour Relations Board's jurisdiction and the nature of an arbitrator's decision, we determine that there is no issue of res judicata that arises in this matter and thus, there is nothing to prevent us from embarking on an examination of the issues submitted by the parties.

We now turn to the collective agreement. The agreement is concerned both about employees and work. The union, according to the recognition clause, is entitled to represent certain defined employees, but it is not just employees in the abstract. The agreement goes on to indicate in the wage schedule the type of work or the occupations which the represented employees are expected to perform. For example, the union is entitled to represent persons who are described as "Turbine Boiler Operator", "Carpenter", "Cleaner" and "Crew foremen". The inference to be drawn is that the collective agreement is concerned both about the employees and the work they perform: see also **Re U.S.W., Local 1817 and Fittings Ltd.** (1969), 20 L.A.C. 249 (Weatherill).

Arbitrators have been liberal in reviewing management's rights to rearrange the work that falls within the perimeter of the collective agreement. This area of work may be determined by totalling the duties and functions of the individual jobs or job classifications, and internal rearrangements of this work are necessary to respond to the normal exigencies of business, or as one arbitrator has indicated, management should be entitled to react to "dynamic, technical and market changes": **Re Windsor Public Utilities Com'n and Int'l Brotherhood of Electrical Workers, Local 911** (1974), 7 L.A.C. (2d) 380 (Adams). Other arbitrators have viewed internal rearrangements in the same vein by stating that employees do not have a "proprietary interest in specific job functions" or that "there is no fence around a particular set of job functions" or that particular job classifications are not necessarily "self-enclosed watertight compartments". Generally, management has been given a wide latitude to react in a reasonable way to both normal and abnormal business conditions. The only condition that from time to time has been attached to the

rearrangement of work or to a response to a particular set of facts is that in some cases employees who have been affected have been awarded compensation.

...

There are also some awards which draw an analogy between the subcontracting cases and the assignment cases, but in our view since the **Russelsteel** award, the two situations cannot be considered analogous because the theoretical basis is not the same. We do not propose to resurrect the pre-Russelsteel controversy in connection with the work assignment cases; suffice it to say that the integrity of the bargaining unit must be given greater support when the total control of the work, the work assignments and the employees within and without the bargaining unit lie with a single employer. In this regard the decision in the **Re U.S.W., Local 3684 and Standard Sanitary and Dominion Radiator Ltd.** (1954), 5 L.A.C. 1684 (Roach), is particularly instructive.

After quoting the passage from the award in that case, related above, Arbitrator Shime concluded:

In our view similar considerations apply to the instant case. Management cannot merely sprinkle or add management functions to bargaining unit work and thereby remove the bargaining unit positions from the bargaining unit because to do so would not only destroy the integrity of the bargaining unit, but the basis upon which the collective agreement was negotiated. Such acts, if permitted, could completely remove all of the work from the bargaining unit and thereby destroy the effect of the collective agreement. The effect of adding management functions to bargaining unit work is, in our view, the same as changing "hourly or piece-work employees to salaried employees doing the same work". Both, in our view, are "contrary to the very essence of the agreement".

In the result, we determine that if the employer wishes to have the work performed which had formerly been performed by crew foremen within the bargaining unit, it must have that work performed by members of the bargaining unit and the mere addition of additional duties and responsibilities to that work cannot remove the work from the bargaining unit.

A consistent line of decisions in this Office has confirmed the position pleaded by the Corporation that the instant collective agreement does not confer upon the Brotherhood a right of exclusive property in all of the tasks assigned to bargaining unit members. Consequently, the occasional assignment of some of the work performed by members of the bargaining unit to members of other bargaining units and on occasion to members of management has been deemed to disclose no violation of the terms of the collective agreement. By the same token, however, this Office has consistently expressed the view, reflected in the arbitration awards cited above, that it is not open to the Corporation to disregard the collective agreement by effectively assigning all of the work of a position established within the collective agreement to a non-bargaining unit employee or to a member of management. If that should occur, the conclusion to be drawn is that the person holding the newly established assignment is in fact performing bargaining unit work and must be treated as falling within the bargaining unit. That principle was expressly recognized in **CROA 2006** which involved the analysis of a collective agreement similar to the instant agreement, where the Arbitrator commented as follows:

An extensive line of decisions issuing from this Office has confirmed that Collective Agreement 5.1 does not confer a proprietary right to bargaining unit work to the Brotherhood. **The awards have acknowledged that in some circumstances the creation of a job or assignment which involve essentially performing little more than the duties of a position falling entirely within the bargaining unit could result in a finding that the person performing the work must be treated as performing work within the bargaining unit.** That, however, is not tantamount to saying that the Company is prohibited from assigning tasks which are sometimes performed by employees in the bargaining unit to non-bargaining unit employees. As Arbitrator Weatherill observed in **CROA 527**:

I was not referred to any provision in the collective agreement (and there appears to be none) which would require the Company to continue to assign particular work to employees in the bargaining unit, or which would prevent it from "contracting out"

certain work, or from assigning it to employees in another area, or in another bargaining unit, or to employees not coming from any bargaining unit.

(See also CROA 117, 118, 246, 322, 381, 693, and 1160.)

(emphasis added)

I turn to consider the facts disclosed in the instant case. As reflected in the notices issued under Article 8.1 of the Supplementary Agreement, the Corporation's action is slated to go into effect in the Montreal, Ottawa and Toronto terminals effective October 1, 1991 and in respect of Winnipeg based employees on May 1, 1992. It is clear, however, that the parties are content to have this matter heard and determined at this time, on the basis of the information presently available respecting the Corporation's proposal. No challenge to the Arbitrator's jurisdiction in that regard has been made.

The position of Service Manager was established by agreement of the parties and incorporated into the terms of the collective agreement on November 14, 1979. It appears that it was introduced onto western lines in the spring of 1980, initially on a experimental basis, and that eventually it became permanent. Service Managers were established in Ontario and Quebec pursuant to a memorandum dated August 27, 1980, again on a test basis prior to becoming a permanent position. It would appear that the parties agreed to add the position of Service Manager to the classifications in Article 5.1 of the collective agreement effective June 5, 1981 by means of a memorandum of agreement dated May 20, 1981. A further memorandum was executed on April 26, 1985 extending the Service Manager's position to certain Montreal-Toronto corridor trains, initially experimentally, and later it was continued on a permanent basis, although no specific memorandum seems to have been executed in that regard. In June of 1987 further additions of the Service Manager's position were made to trains in the Toronto-Windsor corridor and some were also added to the Eastern Transcontinental Service.

By means of an extensive crewing concept agreed to between the parties, the collective agreement was modified effective June 13, 1986 to reduce On-Board service positions from fourteen to seven. The positions established as of that time are as follows:

Service Manager  
 Service Coordinator  
 Assistant Service Coordinator  
 Senior Service Attendant  
 Service Attendant  
 Chef  
 Cook

It is common ground that the Service Manager's position is the most highly paid and the most highly responsible position in On-Board Service.

Appendix 9 of the collective agreement reflects the chain of command and the duties and responsibilities of the seven On-Board Services positions. The description for the duties and responsibilities of Service Manager is as follows:

**Service Manager**

- Reports to Service & Sales Supervisor for briefing (service changes, transportation advices, revenue targets, employee work records, etc.) and participates in assignment of crew to specific areas of work and/or tasks in accordance with predetermined guidelines (activity cars).
- Briefs Service Coordinators and Senior Service Attendants at their reporting times re their own work requirements (activity cards) and those of their subordinates. Briefing will also cover such items as service changes, transportation advices and revenue targets.
- At major terminals, receives sleeping car passengers at reception desk.
- Entrains and detrains in sleeping cars and dayneters as and when required.

- Collects transportation and sells cash fares in sleeping cars and dayneters as and when required and turns same over to Service Coordinator (when operated) to include with his/her remittance.
- At original terminals, checks all cars to ensure they have been properly serviced, set-up, all major systems are functioning and employees are ready to receive passengers and takes appropriate action as warranted.
- Supervises entraining and detraining enroute.
- At regular intervals, observes all employees in the performance of their duties to ensure service standards are maintained and takes appropriate action as warranted (incl. positive reinforcement).
- At regular intervals, patrols train (incl. coaches) and obtains passenger reaction to services offered taking immediate action, if warranted, and/or passes this information along to management for further handling (i.e. service discrepancies, employee performance, product offerings).
- Alters individual employees' activity cards, when necessary, to conform with the unexpected fluctuations in service demands, justifying these changes in writing to Service & Sales Supervisor. Coordinates the dissemination of information re train delays, time changes, etc. to employees and passengers.
- Collaborates with Train Coordinator re second stops, unscheduled stops, unusual incidents impacting on safe operation of train, etc. Collaborates with Service Coordinator to ensure service to passengers available in both "Official Languages".
- Provides on-the-job guidance and counselling to newly appointed Service Coordinators and Senior Service Attendants.
- Participates in the revenue and expense budget process (preparation and analysis) for trains operated under their jurisdiction.
- Prepares and/or collects employee performance reports at end of each trip, ensuring individual employees receive appropriate feedback.
- Resolves, to the best of his/her ability, all matters related to customer complaints and/or potential complaints as well as employee–customer and/or employee–employee differences.
- At end of trip, provides Service & Sales Supervisor with a detailed w account (log) of his/her assessment of the trip.
- Other related duties as assigned by Service & Sales Supervisor.

A reading of the whole of Appendix 9 makes it clear that the Service Manager is the final repository of all On-Board Services authority on the train. While not all employees report directly to him or her, the persons most senior in responsibility, including the Service Coordinator and Senior Service Attendant report directly to the Service Manager. Other employees are all tied to the Service Manager by the fact that they report upwards to those individuals. It is common ground that the Service Manager is the final arbiter of any disagreement among the crew with respect to a decision to be taken as to the performance of any aspect of On-Board Services.

The best evidence with respect to the duties of the newly established position of Manager, Guest Services is in the job bulletin posted by the Corporation effective March 18, 1991. Described as reporting to the Manager, On-Train Services, the main duties of the position are expressed as follows:

**MAIN DUTIES:**

- Selects and hires all new on-train employees.
- Manages people, provides immediate feedback, reinforcement to all service crew. For service crew reporting to him/her, does performance evaluations at set intervals, gives formal feedback, sets improvement and/or development plans and follows up to insure

- accomplishment, authorizes training as required. Ensures citations and other recognition for exemplary performance.
- Investigates complaints and management reports, holds disciplinary hearings, has sole authority to assess any number of demerits in an individual case and/or to demote employee. Contributes to the preparation of any arbitration brief dealing with one of his or her personnel.
  - Plans and sets staffing levels and ensures resources are efficiently and productively used.
  - Final authority on all matters related to Customer Services issues on board the train.
  - Does periodic evaluations of service offered by operating (train) crew, station personnel.
  - Plans regional contribution, in terms of tasks, responsibilities, budgetary allotments, performance indicators, and follow-up processes, on the Customer Services part of the corporate plan as well as on Quality Assurance of Service Delivery results related to his/her product area.
  - Tracks and follows up with Maintenance on conditions reported on car defect sheets, taking appropriate action to ensure readiness of cars for quality service. Takes appropriate action when Health and Sanitation standards are at risk.
  - Acts as the Customer Services representative to resolve inter-branch issues related to quality of guest service. Creates cross-functional ties to follow up effectively on issues with Marketing, Operations, Equipment Maintenance, Human Resources, etc. on behalf of the branch.
  - Actively ensures O.T.S. contribution on intra-branch teams such as stations, TSO, ESC, etc.
  - Implements corporate initiatives on board; communicates reasons, opportunities and constraints to employees; gives consistent updates on corporate plan, elicits employee feedback and follows up on problems they identify. Encourages problem solving behaviour. Motivates and instills sense of product ownership, and constant attention to quality resource management, by personal example.
  - Ensures bilingual services and upholding of Official Languages Act. Recommends changes to service/product design in order to fulfill guests' expectations.
  - Participates in the review process to recommend changes to the collective agreement for the current round of negotiations.

In addition the job posting indicates a higher education requirement than has existed for Service Managers, including a "university degree in Commerce, Management or equivalent in management work experience." The requirement also appears to include good knowledge of French and English, both written and spoken. The bilingualism portion of the job posting, however, invites all current Service Managers or persons holding the position of "Assistant Manager, On-Train Services or Assistant Manager, Customer Services, or the position of conductor in the Transportation department" to apply for the position even though they may not hold the Corporation's current "Level 'E' " in second language training.

The Corporation's representative placed considerable stress on the desire of the Corporation to streamline supervision in On-Board Services and to eliminate a certain degree of duplication in supervisory functions. To this end, it appears that some first line management positions, as well as the position of Service Manager, are being phased out in an effort to rationalize the complement of supervisory staff.

The Corporation's spokesperson argues that the position of Manager, Guest Services is a managerial position separate and distinct from the position of Service Manager. Noting that Service Manager positions are not assigned to all trains within the Corporation's transportation system, the Corporation submits that its decision has not eliminated the classification of Service Manager, but rather it has reserved the option to not use such positions on certain trains for business and operational reasons.

While it is unnecessary for the Arbitrator to evaluate that assertion for the purposes of this grievance, the Union expresses reason to doubt that it is a fair characterization of what is to happen. The Brotherhood filed with the

Arbitrator a document entitled “VIA Rail: Plans for 1991” which was distributed to all employees. That document reflects a plan by the Corporation to rationalize operations and save substantial costs in operating and capital funding in the period between 1990 and 1995. It proposes, among other things, the reduction of operating crews. On page 16 the document specifically addresses the creation of the position of Manager, Guest Services. It reads as follows:

**Manager, Guest Services: a new position**

The thrust for management reform must work for employees on board the trains as much as for those in stations, maintenance centres and offices. Traditionally, on-board employees have had little on-the-job management support; their managers rarely experienced the constraints and difficulties, or the successes, first-hand. This issue has surfaced time and again in employee surveys. On-train service staff have expressed their desire for more direct performance feedback, for management who are visible and who listen, and for greater decision-making authority on board the train.

The creation of the service manager position ten years ago provided an important focus for improved customer service in the 1980's and helped identify problems and roadblocks in the delivery of service. But service managers cannot follow up on problems, or give crew members formal feedback on their performance. And because their own managers work away from the trains and are responsible for up to 100 employees, they are blocked from being effective.

Recognizing this, we have reviewed the way we manage front-line employees and our services. The result has been a clarification of the roles of Customer Services and Transportation employees, and a decision to restructure the first line of Customer Services management. **A new position of manager, guest services will be created; the current position of service manager, and some assistant managers (on-train services), will be phased out.** Views of employees will be used in determining the design for the new position, to ensure needs for support are met. Managers, guest services, will be introduced in the Corridor in the late fall of 1991, with eastern and western service following early in 1992. (emphasis added)

I turn to consider the merits of the positions argued by the parties. In doing so, however, it is useful to reflect on the evidence adduced through witnesses at the arbitration hearing. The Arbitrator considers the evidence of Corporation witness Mr. Connie Gordon, Supervisor of On-Board Services for VIA Quebec, to be the most significant. In his position Mr. Gordon is responsible for the work of all On-Board Services employees, and he has had extensive personal experience in all aspects of operations. During the course of his testimony he was asked if he was familiar with the proposed position of Manager, Guest Services, as well as the duties and responsibilities of the position of Service Manager which is being abolished. He replied in the affirmative. When he was further asked whether any of the duties presently performed by Service Managers will not be performed by the person proposed to hold the new position, he replied with a qualified no. He said all of the functions of the Service Manager will be performed by the Manager, Guest Services, save that he had some residual uncertainty as to whether the performance of hands-on bargaining unit work in the servicing of passengers could be performed under the existing provisions of the collective agreement. When asked to estimate what percentage of a Service Manager's time might be so devoted, he estimated that it would be no more fifteen or twenty minutes in a four hour trip.

While it is not necessary to resolve the concern raised by Mr. Gordon, it may be noted that prior decisions of this Office would suggest that to the extent that the Brotherhood can claim no work ownership of any particular duties, it would appear highly doubtful that the Manager, Guest Services would be prevented from performing hands-on tasks presently discharged by the Service Manager. (See **CROA 2006**, above.) In the result, the Arbitrator finds, on the balance of probabilities, that the Manager, Guest Services will perform all of the duties and responsibilities of the Service Manager.

The issue then becomes whether the functions which will be performed by the Manager, Guest Services which have not heretofore been performed by the Service Manager are such as to justify the Corporation's submission that an entirely new position is established which does not duplicate the position of Service Manager or fall within the terms of the collective agreement.

As reflected in the **Hydro** decision related above, the extent of the managerial functions performed is of no consequence to the issue of whether the collective agreement has been violated. It is contrary to the agreement to

transfer the entire content of a bargaining unit position to management, no matter at what level of responsibility the manager who takes over the work may operate.

If one accepts (which the Arbitrator does not) that the content of the managerial aspect of the new position is a pertinent consideration, an alternative analysis based on that approach still leaves the Corporation's position in substantial doubt. The representation of the Corporation is that 30% of the time of the Manager, Guest Services will be devoted to work off the trains, in his or her office or in the performance of some other Off-Board administrative duties. Stressing the language of the job bulletin that the individuals holding that position will have the authority to hire, discipline and terminate employees, to evaluate the performance of employees in a number of bargaining units, to conduct investigations, to be responsible for follow-up in respect of the report of problems or equipment failures, to have an independent power of decision in respect of budget allotments, it submits that these factors all operate to take the incumbent of that position out of the purview of the Service Manager's job.

When that argument is examined closely, however, it is not compelling. While there is no extensive evidence before the Arbitrator to indicate the amount of time that a first line supervisor might spend in disciplinary investigations, and the enforcement and administration of the collective agreement, it is far from clear that it would be so extensive as to overwhelm the On-Board Services component of the job. In this regard it is worth noting that the position of Assistant Manager, On-Train Services, which is in part a predecessor of the position now being established, contains within its description an allotment of 5% of the incumbent's working time for the administration and interpretation of the collective agreement. Moreover, the Arbitrator is left in some doubt as to the practical extent of the work which will be in fact performed by the incumbent in the new position over and above that presently discharged by the Service Manager in administrative areas such as making adjustments in the number of crews, and formulating and applying budgets to govern On-Board Services.

The evidence before me is clear that Service Managers are extensively involved in the adjustment of crew complements, albeit through a power of effective recommendation rather than through a decision making power. Reality suggests, however, that in many cases those decisions are outwardly dictated by practical needs and passenger loads rather than by the exercise of a sophisticated decision making process. Additionally, while the incumbents in the position of Service Manager do not have decision making power in respect of budgets, it also appear undisputable that their present responsibility for reducing cost and promoting efficiency and productivity involves some degree of Off-Train consultation. It would also appear that many of the decisions as to the administration of the budget which could be taken over by the Manager, Guest Services will, to a great extent, be constrained by the realities of passenger loads and general directives from superiors with respect to the expenditures to be incurred in train operations. While the Arbitrator does not wish to diminish the discretion which would vest in the Manager, Guest Services, it is far from clear that the time that will be taken, either off-train or on-train by the incumbent in that position in issues concerning budget and staffing will significantly exceed the kind of discussion and recommendation time now being expended by the Service Manager.

In the result, while no precise estimate can obviously be made, the Arbitrator is inclined to the view that the tasks to be performed by the Manager, Guest Services will contain all of the duties and responsibilities presently discharged by the Service Manager. In coming to that conclusion I accept that the processes involved in identifying, discussing and recommending courses of action in policy planning, budgets and staffing which are performed by the Service Managers are all contained in the processes which lead to the next step of decision making which will vest in the Manager, Guest Services. Bearing in mind that the Service Manager also has off-train duty time, the additional management functions assigned to the incumbents in the new position may well, on the balance of probabilities, be in the order of 20% of the individual's working time, and sometimes less where circumstances involve the setting up and supervision of relatively routine train trips.

In the result, on the basis of this alternative analysis, the overwhelming majority of the time of a Manager, Guest Services will be devoted to the duties and responsibilities of the former Service Managers. The duties of the latter position constitute the core functions of the new job. On that basis, the Corporation's argument could not succeed. For the reasons related above, however, in any event the authorities are clear that the degree of management authority exercised is of no relevance to the issue of the violation of the collective agreement and the erosion of the integrity of the bargaining unit.

One of the submissions made by the Corporation is that the Brotherhood cannot be heard to protest against the erosion of the bargaining unit, by reason of the fact that the employees whose jobs are abolished pursuant to the Article 8 notice will have employment security protection, and will not lose their incomes. With the greatest respect,

that view utterly fails to understand the concept of the protection of the integrity of a bargaining unit. Collective agreements are about employees, but they are also about work. As was reflected in the decision of Arbitrator Shime in the **Hydro** case, cited above, the fact that the four incumbents in that case were all promoted from the bargaining unit into the newly established management positions was no answer to the fact that the trade union's collective agreement bargaining rights were directly undermined. Similarly, it is no answer to the Brotherhood's concerns about the integrity of its bargaining unit to say that an entire position can be phased out in a portion of the Company's operations, eliminating the highest rated position within the wage scale, merely because the employees affected have employment security protections. Apart from concerns about the downward displacement of employees on active service, or indirect impacts on the recall rights of employees presently laid off, the Corporation cannot turn its back on its agreement with the trade union, expressly reflected in Appendix 9 of the collective agreement, that the duties therein described are, when performed in their entirety, work of the position of the Service Manager which must, by the express agreement of the parties, be provided to members of the bargaining unit. It is, of course, open to the Corporation to do away entirely with the position, subject of course to the abolishment provisions of the Supplemental Agreement. That is not what has transpired, however. In the instant case the Corporation's plan is tantamount to transferring all of the work of the Service Manager's position to the former first line of management. For the reasons related by Arbitrator Shime in the Hydro case, any such action is contrary to the terms of the collective agreement which expressly and impliedly reflect the preservation of the existence and the integrity of the bargaining unit for the duration of the collective agreement.

Lastly, the fact that the job title, the qualifications and the training program have all been upgraded for the position of Manager, Guest Services is of no material consequence to the analysis in the instant grievance. The question is not whether more highly qualified people perform the work of the bargaining unit. It is rather, whether what those people perform, whatever their qualifications, is work which has previously been performed by employees in the bargaining unit, and whether they perform it to such an extent that they virtually do all of the functions of the employees' job, so as to fall within the contemplation of the bargaining unit as described within the collective agreement.

For all of the foregoing reasons the Arbitrator finds and declares that the decision of the Corporation to abolish or phase out the position of Service Manager for the purposes of establishing the new position of Manager, Guest Services, as described in the Article 8 notices provided to the Brotherhood, the job description for the newly established position posted on March 18, 1991, and the information materials circulated to all employees under the title "VIA Rail: plans for 1991", constitutes a violation of the Collective Agreement and of the Supplemental Agreement. The Arbitrator therefore finds and declares that the Article 8 notice is a nullity, to the extent that it is for the purpose of assigning virtually all of the functions of the bargaining unit position of Service Manager to persons outside the Brotherhood's bargaining unit.

The foregoing conclusion does not, of course, preclude the Corporation from approaching the Brotherhood with a view to negotiating such amendment to the terms of the collective agreement as might accommodate, to the greatest extent possible, the business concerns of the Corporation and the bargaining unit integrity concerns of the Brotherhood. That may be particularly feasible in a decade where collective agreements under the **Canada Labour Code** have, to a substantial extent, evolved to allow for the collective bargaining representation of supervisory personnel. That, however, must be a matter for the mutual consideration of the parties.

The Arbitrator retains jurisdiction in the event of any dispute respecting the interpretation or implementation of this award.

**July 18, 1991**

**(Sgd.) MICHEL G. PICHER**  
**ARBITRATOR**