CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2170

Heard at Montreal, Wednesday, 10 July 1991

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

Time claim for 39 hours at the Senior Service Attendant's rate of pay on behalf of Mr. C.E. Izzard, a laid-off employee.

BROTHERHOOD'S STATEMENT OF ISSUE:

On February 11, 1988, the Corporation assigned laid-off employees to work on a special assignment known as the "Chrysler Special" and by-passed the employees on the spareboard who would accept the call or refuse the call under the provisions of Article 7 of Agreement No. 2.

FOR THE BROTHERHOOD:

(SGD.) T. MCGRATH
NATIONAL VICE-PRESIDENT

PRELIMINARY AWARD OF THE ARBITRATOR

The facts giving rise to this dispute are not in contention. A final decision in respect of the grievor's claim was made at the conclusion of the grievance procedure and transmitted to the Brotherhood in a letter dated September 7, 1989. The Brotherhood subsequently requested extensions of the time limits to file the grievance with this Office for arbitration on October 10 and December 5, 1989 as well as on February 5, April 3 and May 31, 1990. In the interim, on March 2, 1990, the Brotherhood requested that the Corporation provide a joint statement of issue as it intended to proceed to arbitration. On May 24, 1990 the Corporation provided signed copies of its proposed joint statement of issue to the Brotherhood. In the result, that document was not acceptable to the Brotherhood, and it later proceeded to submit the matter to the Canadian Railway Office of Arbitration by means of an ex parte statement filed on May 28, 1991.

The Corporation maintains that the filing of the grievance to arbitration with this Office was untimely, having regard both to the rules contained under paragraph 8 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration as well as the time limit provisions found within Articles 24.23 and 25.3 of the collective agreement.

The Brotherhood does not dispute the chronology related above, nor does it assert that from a technical standpoint it's progressing of the grievance to this Office was outside the time limits provided. The position of the

Brotherhood, however, relies upon the fact that during the course of the progressing of the grievance, when time limits had been extended by the Corporation, on May 24, 1990 the Corporation forwarded a proposed Joint Statement of Issue to the Brotherhood. In its brief the Brotherhood makes the following statement:

> The policy between the National Vice-President of the Canadian Brotherhood of Railway, Transport and General Workers and the appropriate officer of VIA Rail Canada Inc., is that once a request for a Joint Statement of Issue is made, the parties do not carry on with requests for time limit extensions. As outlined in Article 25.4, this understanding, practised policy has been in place between the parties, for a considerable amount of time.

Simply stated, the Brotherhood asserts that it is a long standing practice and understanding between the parties that time limits are neither adhered to, nor are extensions required, after the point in time at which a request for a joint statement of issue is made by one of the parties. The Brotherhood argues that the practise established between the parties amounts to a general understanding with respect to the extension of time limits by mutual agreement, as provided for under Article 25.4 of the collective agreement which is as follows:

> **25.4** The time limits as provided in this Article may be extended by mutual agreement.

For the purposes of expedition, the instant case was left with the Arbitrator by the parties for consideration based solely on the written briefs and appended documents. In the circumstances, however, the Arbitrator is unable to resolve the issue of arbitrability having regard to the apparent conflict of fact reflected in the submissions of the two parties. Paragraph 11 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration provides, in part, as follows:

> The Arbitrator may make such investigation as he deems proper and may require that the examination of witnesses be under oath or affirmation. … The Arbitrator shall not be bound by the rules of evidence and practice applicable to proceedings before courts of record but may receive, hear, request and consider any evidence which he may consider relevant.

In the Arbitrator's view this is an appropriate case for the application of the above described authority. As the Arbitrator is virtually without evidence from the Corporation that the practise and understanding pleaded by the Brotherhood has not in fact operated, or conversely, of any evidence from the Brotherhood to substantiate its claim that it did, this file should not be disposed of without some evidence or documentation from the parties on this issue of obvious importance.

For the foregoing reasons the Arbitrator reserves judgement on the issue of arbitrability of this grievance. The General Secretary is hereby directed to list this matter for hearing on both the issue of arbitrability and, if appropriate, the merits of the grievance. Upon the resumption of the hearing the Brotherhood shall be expected to call such evidence as it maintains substantiates its assertion that a practise or understanding of "a considerable amount of time" has been in place between the parties with respect to the waiver of time limits once a request for a joint statement of issue is made. The opportunity will also be provided to the Corporation to examine any witnesses or documents tendered in evidence by the Brotherhood, as well as to place before the Arbitrator any evidence of its own which is pertinent to this issue.

July 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR

(The matter was ultimately resolved between the parties and withdrawn from the Canadian Railway Office of Arbitration.)