CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2263

Heard at Montreal, Tuesday, 14 July 1992

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The withdrawal of Maintenance of Earnings protection to Mr. K. Sing.

JOINT STATEMENT OF ISSUE:

Following the General Bid in the Atlantic Region in May 1991, Mr. K. Sing was placed on the spareboard. Five junior employees were awarded regularly assigned positions. The Corporation withdrew Mr. Sing's Maintenance of Earnings protection effective May 26, 1991. The Brotherhood contends that the Corporation has violated Article 8.9 of the Special Agreement or Article E of the Special Agreement. The Brotherhood contends that it has been a long standing practice in the Atlantic Region that spareboard assignments have been considered the same as regular assignments. The Brotherhood argues that "*The regular position he did apply for was lower rated that the Maintenance of Earnings he was on, therefore he was not obligated to apply under either the Special or Supplemental Agreements*." The Brotherhood seeks to have Mr. Sing's Maintenance of Earnings reinstated and also compensation for any monetary loss he may have suffered.

The Corporation has rejected the grievance as untimely and contests its arbitrability.

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

There appeared on behalf of the Corporation:

D. S. Fisher	– Senior Officer, Labour Relations, Montreal
M. St-Jules	– Senior Negotiator and Advisor, Labour Relations, Montreal
J. Kish	– Senior Advisor, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
F. Steadman	– Assistant Manager, Customer Services, Montreal
C. Rouleau	– Senior Officer, Labour Relations, Montreal

And on behalf of the Brotherhood:

T. Barron	– Representative, Moncton
K. Sing	– Grievor

PRELIMINARY AWARD OF THE ARBITRATOR

The Corporation contests the arbitrability of this grievance, asserting that the grievor failed to meet the time limits within the collective agreement for filing his grievance. It is common ground that on May 21, 1991 Mr. Sing was verbally advised by his supervisor that he was losing his maintenance of earnings protection effective May 26, 1991 because he allegedly failed to bid on a regular assignment in the general bid. The Corporation submits that the grievance should have been filed by Mr. Sing within twenty-one days of that notification, as required by Article 24.21 of the collective agreement, which provides as follows:

> **24.21** Any complaint raised by employees concerning the interpretation, application or alleged violation of this Agreement or that they have been unjustly dealt with shall be handled in the following manner:
>
> STEP 1
> Within 21 calendar days from cause of grievance or complaint employees and/or the Local Chairperson must present the grievance or complaint in writing to the immediate supervisor who will give a decision as soon as possible but in any case within 21 calendar days of receipt of grievance.

The alternative position of the Corporation is that Mr. Sing received written notification of the Corporation's position in the form of a letter left in his terminal mail slot on May 27, 1991. It is common ground that Mr. Sing filed his grievance on July 24, 1991, some sixty-four days after the statement of his supervisor, and fifty-nine days following the issuing of the notice in writing. The grievor denies having received any written notice, although there is no dispute that he was told of the Corporation's position on May 21, 1991.

The Corporation submits that article 24.23 disposes of the arbitrability of Mr. Sing's grievance. It provides, in part, as follows:

> **24.23** Where any grievance is not progressed by the Brotherhood within the prescribed time limits, the grievance will be considered to be dropped. ...

The Brotherhood raises a number of positions in dispute of the Corporation's challenge to arbitrability. Among other things, it submits that the Corporation has failed to abide by the requirement of the collective agreement, and of the document establishing the Canadian Railway Office of Arbitration, in that it has not identified any specific provision of the collective agreement which it alleges was violated, within the joint statement of issue. The Brotherhood further submits that the mandatory time limits expressed in article 24.23 do not apply to the filing of a grievance by an individual employee, to the extent that it speaks to "... any grievance ... not progressed by the Brotherhood within the prescribed time limits," It argues that the filing of a grievance by an individual employee, at step one, falls outside the purview of that provision. Lastly, the Brotherhood maintains that, in any event, the "cause of grievance" within the meaning of Step 1, as provided in article 24.21 did not arise until July 18, 1991, when the grievor received his first reduced pay cheque, without maintenance of earnings. It submits that at that point Mr. Sing was impacted by the Corporation's action, and had cause to file a grievance.

The Arbitrator deals with the final submission first. The Corporation's representative argues that it was incumbent upon Mr. Sing to file his grievance within twenty-one days of the time he was verbally notified of the Corporation's opinion that he had forfeited his entitlement to maintenance of earnings protection. On that basis it submits that the twenty-one days during which he had the right to file a grievance must be computed from May 21, 1991. In support of that position it refers the Arbitrator to the decision of this Office in **CROA 1308**. There it was found that the grievance of an employee against his assignment was untimely. In that case the Company submitted that the forty day period for filing a grievance commenced to run on February 1, 1984, when the grievor became aware of his assignment. The Union argued that the cause of the grievance arose from the time the grievor first received payment for the lower wages of that assignment, on March 15, 1984.

The Arbitrator rejected the position of the Union, reasoning, in part, as follows:

> In dealing with the parties' submissions, I am satisfied that the "cause" of the grievor's complaint arose on February 1, 1984 when the impugned assignment was made. The grievor at that time, as exhibited by his protest, knew he was going to be paid at the rate attached to the senior second cook's position. And, even if he did not know he should be deemed to have known by virtue of his access to the relevant collective agreement. Surely an employee cannot delay indefinitely the processing of a "timely" grievance until such time as he or she receives confirmation of an alleged

> violation as shown in a pay cheque. Or, alternatively that employee delays the processing of such grievance for that reason at his or her peril.

In the Arbitrator's view there is a distinction to be made between the facts considered by this Office in **CROA 1308**, and the facts in the case at hand. A review of the briefs submitted in **CROA 1308** discloses that on February 1, 1984 the grievor was in fact assigned and worked in the lower rated classification. There was, in other words, no delay between the communication of the Company's position and its implementation. The Arbitrator concluded, quite properly, that as of February 1, 1984, when he was working in the lower rated assignment, the grievor had full knowledge of the purported violation of his rights by the employer, and could not point to the receipt of his pay cheque as being the point in time at which the cause of his grievance arose.

Although the distinction is a fine one, the facts in the case at hand are different. As of May 21, 1991 Mr. Sing was made aware that he and the Corporation were disagreed as to his status and entitlement to maintenance of earnings protection. The practical impact of the Corporation's action did not occur, however, until July 18, 1991 because of the delayed payroll system under which the grievor was working. It is only then that he got confirmation that the Corporation's opinion would be acted upon, when he received the first reduced pay cheque which was substantially smaller because of the employer's failure to pay the maintenance of earnings which he had received until that time.

Under certain provincial labour relations acts arbitrators are given a discretionary power to relieve against a failure of time limits. No such discretion, however, is to be found in the Canada Labour Code. Consequently, where time limits within a collective agreement are found to be mandatory, the failure to meet them will be fatal to the rights of grieving employees. It is, therefore, understandable that boards of arbitration under the Code exercise considerable care in interpreting the provisions of a collective agreement which govern the triggering of time limits. Where two interpretations are possible, boards of arbitration should not be astute to defeat the rights of employees to redress through the grievance and arbitration provisions of a collective agreement. Rather, they should apply a fair and liberal approach which gives the benefit of the doubt to the employee whose vital interests are at stake.

In this regard distinctions have been made between an employer expressing an opinion as to an employee's status on the one hand, and taking positive action in relation to that status on the other. Arbitral opinion holds that in such circumstances it is the positive action of the employer, such as the withholding of wages, the layoff of an employee or some such similar action which creates the cause of the grievance for the purposes of computing time limits. The announcement of a general intention or opinion on the part of an employer or its officer may not be sufficient to trigger time limits that can effectively bar an employee from the grievance and arbitration process.

The principles bearing on this issue were considered in **Re Canadian Broadcasting Corporation and Canadian Union of Public Employees** (1985) 21 L.A.C. 3(d) 389 (M.G. Picher). In that case the issue was whether an employee was or was not probationary at the time of her release by the Corporation. At a certain point in time she had been advised that her probation period was being extended. She did not grieve the notification, or the employer's opinion. However the grievor and the union took the position that it was a nullity and that she was in fact a confirmed full time employee at the time of her subsequent termination. The Union argued that it was open to the grievor to dispute her employment status in a grievance filed within the time limit, calculated from notification of her discharge. The Arbitrator accepted that position, reasoning, at pp 392-94, as follows:

> It is common ground that the grievor did not file a grievance in response to the corporation's notice of April 10, 1984, advising her that her probationary period was being extended. The first sign of protest from the grievor came within four days of the notification on June 21, 1984, advising her that she was terminated. That protest took the form of the instant grievance.
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> The corporation submits that in these circumstances the grievance is untimely. It maintains that if the grievor took issue with the extension of her probationary period, it was incumbent upon her to grieve the position asserted by the corporation in its letter of April 10, 1984. In this regard counsel for the corporation refers to the arbitrator to arts. 56.4 and 56.17:
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> > **56.4** When a grievance arises at the Local Level, the employee(s) and/or the union representative shall submit it in writing to the Local Officer-in-Charge of Industrial Relations on the prescribed form (Appendix 'A') within thirty (30) days of the employee becoming aware of the incident. This time limit is exclusive of absences and out-of-town assignments.
> >
> > **56.17** Any time limit mentioned in the above Articles dealing with the grievance procedure and arbitration shall exclude Saturdays, Sundays and statutory holidays, and may be extended

> by mutual consent in writing. For the purposes of this article, statutory holidays shall be interpreted to include any holidays recognized in this Agreement (Articles 34.1 and 34.2).
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> The Arbitrator has difficulty with the position of the corporation on the issue of timeliness. At most, the letter which Ms. Pagé received on June 21, 1984, is a statement by the corporation as to its view of her employment status. The status of an employee, and in particular whether he or she is a probationary employee, is not a matter entirely in the discretion of the corporation. Employee status is controlled by the terms of the collective agreement, and the corporation's discretion is to that extent limited or constrained. If an employee has the status of a full-time, continuing employee, that status is fixed in law, and cannot be altered by a unilateral assertion to the contrary by an officer of the corporation.
>
> In the circumstances, was there an obligation on the part of the grievor to grieve the letter advising her that her probationary period was being extended? I think not. Firstly, there was at the time of the notification no immediate practical consequence that was clearly adverse to the grievor. She could reasonably have expected that in all likelihood nothing would come of the corporation's position that she was still probationary, and that she would be confirmed in her position, with her seniority thereafter to be computed retroactive to her date of hire, as contemplated by art. 32 of the collective agreement. If that sequence of events unfolded, there would be no harm done to the grievor. It is understandable that an employee should be reluctant to precipitate a dispute with his or her employer, particularly where the merits of the dispute might well become academic. In the arbitrator's view it is when the dispute ceases to be academic, and has some meaningful consequence for the parties, that the obligation to grieve arises. In the instant case that happened only when the corporation purported to release the grievor as a probationary employee in June of 1984. At that point the previously expressed position of the corporation matured into an action of obvious consequence to Ms. Pagé.
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> The arbitrator is satisfied that it is only at the point of discharge that there was an "incident" that became grievable, as that concept is contemplated in art. 56.4 of the agreement. The incident might have occurred otherwise, as for example if the grievor had been denied the right to bid on a job posting or had been denied bumping rights in a lay-off. In my view the mere communication of the opinion of an officer of the corporation that an employee continues to be probationary does not constitute an "incident" within the meaning of art. 56.4 which can or should be grieved. It is fair to assume that the parties did not intend to burden the grievance procedure with disputes and claims that are purely theoretical and without practical consequence. If a grievance had been launched when the grievor received the letter of April 10, 1984, the corporation might well have successfully argued that it should not proceed immediately through the grievance procedure or go to arbitration because it was at most an academic issue until such time as some adverse consequence resulted to the grievor. The incident which put the grievor's employment status into question in a meaningful way did not occur until her termination on June 21, 1984. The instant grievance was filed within four days of that event, well within the time-limit established in art. 56.4 of the collective agreement. For these reasons, the arbitrator cannot accede to the position advanced by the corporation on the issue of timeliness.

In my view the approach reflected in the above passage commends itself to the facts in the instant case. I deem it unnecessary to determine whether a grievance which might have been filed by Mr. Sing on or about May 21, 1991 would have been premature. The material before the Arbitrator suggests that at the time there was a general disagreement between the Corporation and the Brotherhood with respect to whether bidding a spareboard position would be considered the same as bidding a regular assignment for the purposes of preserving an employee's maintenance of earnings. There was, at a minimum, an unresolved point of contention between the Corporation and the Brotherhood which, arguably, might have been resolved between the parties before the Corporation's action directly impacted any employee. In that circumstance, in the Arbitrator's view, it is not unreasonable for an employee not to take issue with the expression of opinion by a company officer with respect to his or her status, until such time as that opinion is converted into direct employer action which negatively impacts the employee.

In Mr. Sing's case that did not occur until July 18, 1991 when, he alleges, he was wrongfully denied maintenance of earnings protections, when he received his first reduced pay cheque. It is, I think, fair to say that as of that date he first experienced the "cause of grievance" contemplated within Step 1 of article 24.21 of the collective agreement. His circumstances are, in my view, distinguishable from the grievor in CROA 1308, who was negatively impacted from the day he was assigned and was actually working in the lower rated classification.

In the case at hand, it is the payment of wages which is grieved, an action which did not occur until July 18, 1991. The grievance, filed within twenty-one days of that date, cannot be said to be untimely.

For the foregoing reasons the Arbitrator finds that the grievance is arbitrable. In light of the disposition of the issue of timeliness, on the basis of the final argument raised by the Brotherhood, the Arbitrator deems it appropriate to make no comment on the merits of the other arguments submitted. The matter is therefore referred to the General Secretary for continuation of hearing.

July 17, 1992 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR

On Tuesday, 8 September 1992;
There appeared on behalf of the Corporation:

D. S. Fisher	– Senior Officer, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
M. St-Jules	– Senior Negotiator and Advisor, Labour Relations, Montreal

And on behalf of the Brotherhood:

G. Murrary	– Regional Vice-President, Moncton
T. Barron	– Representative, Moncton
K. Sing	– Grievor

AWARD OF THE ARBITRATOR

The Brotherhood's claim is based entirely on the content of an agreement which it maintains is still in effect, as reflected in the minutes of a joint union/management meeting held in Halifax, on April 10, 1987. It is common ground that the general rule respecting the application of maintenance of earnings provisions is contrary to the position advanced by the Brotherhood in this case. Generally, system wide, employees are compelled, firstly, to bid on regular assigned positions for which they are qualified and to which their seniority will entitle them, as a condition of preserving their maintenance of earnings. In the instant case Mr. Sing declined to bid to the highest rated regular assigned position which his seniority could obtain, and elected the spareboard instead. In the normal course that would result in a loss of his maintenance of earnings. The issue therefore becomes whether the agreement of April 10, 1987 makes an exception in his case.

The minutes of the meeting relied upon by the Brotherhood contain, in part, the following:

> The Corporation stated the spareboard is considered a position for maintenance of earnings purposes. An employee has to exercise full seniority at the home location to be entitled to benefits – this includes exercising seniority to the spareboard.
>
> Discussion followed regarding information to employees about protecting themselves when bidding. The information shown on the last general bid was discussed. It was agreed that in future, all bids will clearly show that the spareboard is considered a position for maintenance of earnings purposes. ...

It is common ground that the foregoing agreement, made locally in the Atlantic Region, arose as a result of the concerns of the Brotherhood respecting the reduction of positions following major crewing changes introduced at that time.

If the evidence stood as it did at that time, the position of the Brotherhood might be persuasive. In fact, however, there is further evidence to suggest that the parties abandoned their local agreement. Firstly, notwithstanding the indication that future bid notices would show that the spareboard is considered a position for maintenance of earnings purposes, there is no evidence that bid documents issued subsequent to April 10, 1987 gave any such indication. A general bid notice dated May 1, 1988, filed in evidence by the Corporation, contains no statement to the effect that the spareboard is considered a position for the purposes of maintenance of earnings protections. Moreover, it appears that several employees were denied maintenance of earnings on the grounds that they elected the spareboard rather than protect a regularly assigned position for which they were qualified and which their seniority could have secured. There were no grievances taken against that action by the Brotherhood.

Perhaps most significantly, a subsequent meeting between the local officers of the Brotherhood and the Corporation, at which the grievor attended as local chairperson, on June 6, 1988, reflects a subsequent understanding which is contrary to the agreement contained in the minutes of the meeting of April 10, 1987. Under the heading "new business" article 5 of the minutes contains the following entry:

MAINTENANCE OF EARNINGS

Employees must bid regular assigned position. Failure to bid permanent positions will result in the loss of Maintenance Of Earnings.

In the foregoing passage the phrase “permanent position” is plainly to be distinguished from a spare position. Significantly, it does not not appear as a statement of the Corporation, but rather as a proposition jointly accepted and incorporated into the minutes.

The Arbitrator can understand the Brotherhood’s wish to rely on a local agreement reflected in the minutes of a joint management/union meeting. It cannot, however, rely on a set of minutes which are subsequently overruled at a later meeting. In the Arbitrator’s view the content of the minutes of the meeting of June 6, 1988 leave little doubt as to the ultimate understanding of the parties. Reference in paragraph 5 of that document to “regular assigned position” and “permanent positions” in the context of the general practice, system wide, with respect to the protection of maintenance of earnings is, in the Arbitrator’s view, more consistent with the view of the Corporation that the spareboard is not to be considered a position for the purposes of the protection of maintenance of earnings. If in fact an agreement was reached in April of 1987 with respect to that issue, it had been effectively abandoned by June of 1988. That view, moreover, is further supported by the fact that the bid notices contain no contrary indication, as well as the fact that the Brotherhood acquiesced in the Corporation’s treatment of employees in the Atlantic Region who were treated as having lost their maintenance of earnings when they elected the spareboard. Lastly, the Arbitrator cannot accept the procedural argument submitted by the Brotherhood which asserts that the Corporation cannot dispute the merits of the grievance because of the wording of the joint statement. Its representative submits that because the joint statement of issue articulates the Corporation’s objection as to the timeliness of the grievance, and makes no specific reference to its disagreement with the position of the Brotherhood on the merits, that that issue must be taken as resolved in the Brotherhood’s favour. Clause 8 of the Memorandum of Agreement establishing this Office requires that the joint statement of issue contain the facts of the dispute and make reference to the provisions of the collective agreement which are alleged to have been violated. Clause 12 of the memorandum limits the arbitrator’s power of decision to “... disputes or questions contained in the joint statement”. In the case at hand the joint statement of issue contains the contention of the Brotherhood that the Corporation violated Article 8.9 of the Special Agreement or Article E of the Special Agreement by virtue of its treatment of Mr. Sing. That issue is therefore properly before me and ripe for determination in accordance with the requirements of the Memorandum of Agreement. It is clear from the face of the joint statement of issue that the parties were disagreed as to the application of the articles in question. The fact that the joint statement makes separate reference to the Corporation’s position on timeliness does not diminish or negate the substance of the dispute contained in the joint statement.

For all of the foregoing reasons the grievance must be dismissed.

September 11, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR