CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2269

Heard at Montreal, Thursday, 16 July 1992

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

A spareboard employee's (with Maintenance of Earnings protection) entitlement to compensation when booking lay-over periods for rest under Article 7.11(b) of Collective Agreement No. 2.

JOINT STATEMENT OF ISSUE:

Effective January 1, 1992, the Corporation began reducing the maintenance of earning (M.O.E.) payments made to protected employees on the spareboards by 5.71 hours for each day of rest booked under Article 7.11(b).

The Brotherhood believes that the Corporation has violated Articles 4.2(a), (b), (c) and (d), as well as Articles 4.13 and 7.11(b) of Collective Agreement No. 2. The Brotherhood also alleges that the Corporation has violated sub-sections 4(6), 4(7) and 4(8) of the Canada Labour Standards Regulations.

The Brotherhood believes that spareboard employees with M.O.E. protection should be treated as if they were regularly assigned, based on the fact that they have their guarantee and rates of pay protected as if they were on regularly assigned positions.

The Brotherhood requests that all employees on the spareboards with M.O.E. protection be assigned or allowed a minimum of 8 calendar days lay-over at their home terminal for each designated 4 week period. The Brotherhood also requests that all affected employees be paid any wages and/or benefits lost as a result of not being paid or treated as if they were regularly assigned.

The Corporation denies any violation of the Collective Agreement or of the Canada Labour Standards Regulations. The Corporation maintains that there is no Article of the Collective Agreement that provides maintenance of earnings protection for employees when they are granted lay-over periods for rest under Article 7.11(b). Furthermore the Corporation maintains that it has not denied any employee the right to book lay-over periods for rest (except in emergencies, as provided for in Article 7.11(b)). However, the Corporation believes that when an employee renders himself unavailable for work then the maintenance of earnings payments should be reduced accordingly.

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
C. Pollock	– Senior Officer, Labour Relations, Montreal
J. Kish	– Senior Advisor, Labour Relations, Montreal
C. Rouleau	– Senior Officer, Labour Relations, Montreal
H. Dickinson	– Assistant Manager, Administrative Support, O.T.S., Montreal

And on behalf of the Brotherhood:

T. N. Stol – National Vice-President, Ottawa
A. DellaPenna – Local Chairman, Montreal

AWARD OF THE ARBITRATOR

The core issue raised by this grievance is whether the Corporation is entitled to reduce the maintenance of earnings payment of employees by reason of the fact that they have booked rest. In the Arbitrator's view, the positions which motivate both parties in this dispute are understandable. The Corporation has concerns that the maintenance of earnings system was, prior to January 1, 1992, subject to abuse by spareboard employees who, by booking rest, achieved earnings comparable to those of regularly assigned employees while working substantially fewer hours in the same pay period. This, it believes, creates a windfall to the employees concerned and an overall unfairness in a manner which was not intended by the maintenance of earnings provisions negotiated between the parties.

The Brotherhood's concern is that the Corporation's action has effectively deprived spareboard employees of the ability to book rest. Since, under the Corporation's new policy, booking rest involves an automatic reduction of 5.71 hours for each rest day from an employee's maintenance of earnings payments, spareboard employees are understandably reluctant to book rest. In the result, as the evidence discloses, many of them work for extended periods, sometimes as long as eleven days, without any day off. Moreover, the days off which they do have are in fact days during which they must remain at all times available for a call, again in order to protect their maintenance of earnings. In the result, the spareboard employees who were previously regularly assigned are subject to substantially different conditions of employment to maintain their previous earnings. Similarly, spareboard employees with maintenance of earnings protections who were previously on the spareboard, who by the agreement of the parties are covered by the Special Agreement, are now able to book rest only at substantial cost to their maintenance of earnings.

Maintenance of an employee's earnings is governed by article E of the Special Agreement negotiated between the parties dated November 19, 1989. It specifically provides for the conditions which will justify the reduction of an employee's maintenance of earnings incumbency. Article E provides, in part, as follows:

> **E.1** An employee whose position rate is reduced by $2.00 or more per week, by reason of his position being abolished or his being displaced will continue to be paid at the position rate (exclusive of incidental overtime) applicable to the position permanently held at the time of the change providing that, in the exercise of seniority, he first accepts the highest-rated position at his location to which his seniority and qualifications entitle him. An employee who fails to accept the highest-rated position for which he is senior and qualified, will be considered as occupying such position and his incumbency shall be reduced correspondingly.
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> **E.2** An employee entitled to maintenance of earnings, who voluntarily exercises his seniority beyond his home location on his seniority territory rather than occupy a position at his home location, shall be entitled to maintenance of earnings. Such an employee will be treated in the following manner: If the position he occupies at his new location is lower-rated than a position he could have occupied at either his original location or his new location, he shall be considered as occupying the higher-rated position, in either case, and his incumbency will be reduced correspondingly.
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> **E.3** The maintenance of employee's earnings will continue until:
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> **(i)** the dollar value of the incumbency above the prevailing position rate has been maintained for a period of five years, and thereafter until subsequent general wage increases applied on the basic rate of the position he is holding erase the incumbency differential, or
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> **(ii)** the employee fails to apply for a position, the rate of which is higher by an amount of $2.00 per week or more than the rate of the position which he is presently holding and for which he is qualified at the location where he is employed.
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> In the application of Article E.3(ii) above, an employee who fails to apply for a higher-rated position (excluding a temporary vacancy of less than three-months), for which he is qualified, will be considered as occupying such position and his incumbency shall be reduced correspondingly. In the case of a temporary vacancy of three months or more, his incumbency will be reduced only for the duration of that temporary vacancy.

The concept of maintenance of earnings or maintenance of basic rates has relatively broad application in the railway industry. It is found, for example, within article 8.9 of the Supplemental Agreement between the parties to this grievance, made July 1, 1989. Maintenance of earnings is a measure to minimize the adverse impact upon an employee of an event, such as a substantial reduction in staff resulting from change in operations. Simply put, maintenance of earnings gives to the employee who is required to displace into a lower paid position an incumbency rate which reflects the rate of earnings which he or she enjoyed prior to the change. Generally, as a condition of retaining the protection of maintenance of earnings the employee is required to exercise his or her seniority so as to occupy the highest rated position, within a defined geographic area, which his or her seniority and qualifications will secure. The failure to take such a position can, depending on the circumstances, result in the reduction or loss of an employee's maintenance of earnings protection.

It is common ground that the Special Agreement which is the subject of this grievance is the first occasion upon which the parties have agreed to extend maintenance of earnings protection to employees in spareboard service. The terms of a memorandum of agreement made between the parties on November 19, 1989, governing a general bid for positions following the abolishment of all previous positions, effective January 15, 1990, contemplates, in article 6, that employees covered by Collective Agreement No. 2 who were unsuccessful in securing a regular assignment could elect to operate from the spareboard.

The thrust of the Corporation's position is that each and every daily spareboard assignment offered to an employee constitutes "the higher-rated position for which he is senior and qualified" within the meaning of article E of the Special Agreement. It submits that the employee's failure to be available to accept such a position brings the employee within the proviso for maintenance of earnings reductions reflected in various parts of article E.

Having regard to the history and general application of maintenance of earnings protections within the railway industry, and to the particular language of article E of the Special Agreement, the Arbitrator cannot sustain that interpretation. Firstly, a general reading of the provisions of article E of the Special Agreement indicates, I think, the clear understanding of the parties that its language is framed in contemplation of an employee occupying what may generally be described as a continuing position of some kind. That is reflected, in part, in the final paragraph of article E.3 which provides that an employee's incumbency is not be reduced if he or she should fail to apply for a temporary vacancy of less than three months.

It is common ground that the Corporation has never before applied the interpretation advanced in its revised policy, and has administered maintenance of earnings in a contrary fashion since 1978. Given the history of maintenance of earnings provisions, and the language of article E, the Arbitrator has substantial difficulty concluding that the parties would have intended that each and every daily assignment taken by a spareboard employee constitutes a separate "position" in respect of which he or she must exercise maximum seniority, day after day, failing which the employee's incumbency rate will be reduced.

The entitlement of employees to rest, and the definition of days off and rest periods is generally a matter of substantial importance to the parties to any collective agreement. The agreement at hand is no exception. The entitlement of spare employees to book rest is specifically provided for in article 7.11 of the collective agreement, which provides as follows:

> **7.11 (a)** Spare employees will be returned to the spare board in accordance with Articles 7.9 and 7.10 and will not be called until expiration of their rest period except in event of emergency.
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> **(b)** Spare employees may, on signed request, have a layover period for rest (at home terminal) after revenue or deadhead service not exceeding in total the compensated hours for their last round trip in Transcontinental Service and twice the compensated hours in other than Transcontinental Service except in event of emergency.

Article 4.13 of the collective agreement further provides:

> **4.13** Employees shall be allowed a minimum of 8 calendar days' layover at their home terminal for each designated four-week period.

If the position of the Corporation in the instant dispute is correct, the maintenance of earnings provisions found in article E of the Special Agreement have engrafted an amendment to article 7 of the Collective Agreement by effectively providing that spareboard employees who exercise their collective agreement right to book rest shall have their earnings reduced, and that the reduction shall be automatic regardless of the number of rest days booked within a pay period.

In the Arbitrator's view so startling a conclusion, and one at such obvious variance with the general intent of maintenance of earnings agreements found generally within the railway industry, cannot be sustained absent clear and unequivocal language to support it. There is, very simply, no such language to be found in either the Collective Agreement or in the terms of the Special Agreement. In the Arbitrator's opinion, the better view is that an employee can be said to occupy a "position" for the purposes of the Special Agreement to the extent that he or she retains status on a spareboard, no less than the employee who occupies a position in regular assigned service or in a regular part-time assignment, as specifically agreed to in the Special Bulletin of November 4, 1989 governing the General Bid of January 15, 1990. The specific train or classification of work held on any given day by a spareboard employee is, for the purposes of maintenance of earnings, better understood as an assignment, and not as a "position" upon which an employee must bid for the purposes of protecting his or her maintenance of earnings.

In the Arbitrator's view the provisions of article 4.13 apply to all employees as defined in the collective agreement. Various parts of article 4 refer to special classes of employees, such as "regularly assigned employees" and "spare employees" as well as to the broader designation "employees" in general, depending upon the matter addressed within the subsection in question. For example, article 4.5 speaks to the rights of assigned employees on a regular run held at their away from home terminal beyond the established layover period. Article 4.15 speaks to the compensation of spare employees who work in a higher classification on the home trip than the outbound trip. Article 4.10, by contrast, speaks generally to "employees deadheading on a car or on a pass on railway business ..." , and provides for minimum payment provisions which would cover both spare and assigned employees. The Arbitrator can find no basis in the language of article 4 to sustain the suggestion of the Corporation that it is merely permissive or somehow qualified by article 7.11(b). It is, therefore, not open to the Corporation to adopt a mechanism for regulating maintenance of earnings provisions which would deprive a spare employee of a minimum of eight calendar days' layover at his or her home terminal for any designated four week period. It should be added, however, that there is nothing in any of the provisions reviewed by the Arbitrator to suggest that spare employees, including those who have maintenance of earnings protection, are necessarily entitled to the same opportunity for rest days, beyond those provided for in article 4.13, which may be achievable by employees who hold positions in regular assigned service.

The Arbitrator's conclusions do not preclude the Corporation from taking other initiatives, consistent with the Collective Agreement and the Special Agreement, to prevent abuse of the maintenance of earnings provisions by spareboard employees. A number of such mechanisms were discussed at the hearing, certain of which would not appear objectionable to the Brotherhood. Without commenting more specifically, it would appear to the Arbitrator that the Corporation is within its rights to establish a fair and objective mechanism which draws an appropriate degree of correspondence between the number of days worked by a spareboard employee over an entire pay period, as compared with a regularly assigned employee, and his or her overall earnings.

For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the policy of the Corporation introduced effective January 1, 1992 whereby the maintenance of earnings payments of protected employees on spareboards was reduced by 5.71 hours for each day of rest booked is contrary to the provisions of the Collective Agreement and of the Special Agreement and, in particular, discloses a violation of articles 4.13 and 7.11(b) of Collective Agreement No. 2. The Corporation is directed to compensate employees for any wages or benefits lost by reason of the application of the policy. In accordance with the general policy of the Office, the Arbitrator retains jurisdiction should it be necessary to resolve any aspect of the interpretation or implementation of this award.

July 17, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR