CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2363

Heard at Montreal, Tuesday, 11 May 1993

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

The Corporation is denying Mr. John Mills access to employment under Agreement No. 2, which is considered unjust, discriminatory and contrary to Article 24 of Agreement No. 2 and the Canadian Human Rights Act.

BROTHERHOOD'S STATEMENT OF ISSUE:

On or about August 12, 1992, the Union filed a grievance on behalf of Mr. Mills alleging that the Corporation was denying him access to employment under Agreement No. 2.

The Union contends that Mr. Mills attended a medical appointment with a specialist of VIA Rail's choice, and the Corporation has medical evidence which supports Mr. Mills' being capable of returning to work.

The Union contends that the Corporation has a duty to accommodate Mr. Mills in accordance with the Canadian Human Rights Act.

The Union contends that the action of the Corporation in denying Mr. Mills the opportunity to return to work is unjust, discriminatory and contrary to Collective Agreement No. 2 and the Canadian Human Rights Act.

The Union requests that Mr. Mills be permitted to return to work and that he be compensated for all lost wages and benefits, including interest. Furthermore, VIA Rail is duty-bound to accommodate Mr. Mills in alternate employment, including return to Employment Security status, if he is deemed unfit to go back to his regular occupation.

The Corporation denied the grievance at all steps of the grievance procedure.

FOR THE BROTHERHOOD:
(SGD.)T. N. STOL
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Corporation:

D. S. Fisher	– Senior Negotiator & Advisor, Labour Relations, Montreal
J. R. Kish	– Senior Advisor, Labour Relations, Montreal
C. Rouleau	– Senior Officer, Labour Relations, Montreal
C. Thomas	– Senior Officer, Human Resources, Montreal

And on behalf of the Brotherhood:

T. Barron	– Representative, Moncton
G. Gallant	– Representative, Moncton

[AMENDED COPY]

PRELIMINARY AWARD OF THE ARBITRATOR

It is not disputed that the grievance rests, in part, on the Brotherhood's assertion that the grievor was "unjustly dealt with" in alleged violation of article 24.21 of the collective agreement. While at the arbitration hearing the Brotherhood's representative sought to characterize the matter as one of discipline, that is not reflected in the grievance documentation. The event giving rise to the dispute is the Corporation's determination that the grievor is unfit to work for reasons of physical or medical incapacity. However, the Brotherhood did not allege that the grievor was suspended without just cause or that he was constructively discharged. In my view, to permit the Brotherhood to now characterize the case as a matter of discipline would involve a departure from the *ex parte* statement of issue filed by the Brotherhood. Under the rules establishing this Office, and in particular paragraph 12 of the Memorandum, the Arbitrator's jurisdiction is limited to those matters raised in the statement of issue. That document makes no mention of discipline. It asserts that the treatment of the grievor was "unjust, discriminatory and contrary to Article 24" of the collective agreement. Paragraph 12 of the Memorandum establishing the Office provides as follows:

> The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements, as the case may be, or, where the applicable Collective Agreement itself defines and restricts the issues, conditions and questions which may be arbitrated, to such issues, conditions or questions. The decision of the arbitrator shall not in any case add to, subtract from, modify or disregard any provision of the applicable Collective Agreement.

The Arbitrator therefore concludes that the grievance cannot be considered on any other basis save the grounds articulated in the statement of issue. (*See* CROA 1163, 1205, 1430, 1440, 1622, 1630, *&* 1960.)

The first issue to be resolved is whether the alleged violation of article 24.21 is arbitrable. Article 24.21 of the collective agreement provides, in part, 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: ...

Article 25.2 speaks specifically to the issues which are unresolved after the exhaustion of the steps of the grievance procedure and which may be referred to the Canadian Railway Office of Arbitration for final determination. It provides as follows:

> **25.2** A grievance concerning the interpretation or alleged violation of this Agreement or an appeal by an employee that he has been unjustly disciplined or discharged and which is not settled at Step 3, may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work in accordance with the regulations of that office.

In the case at hand the Brotherhood maintains that article 24.21 has been violated. In that regard, it submits that the grievor has been "unjustly dealt with" within the meaning of article 24.21.

The Corporation does not deny that the Brotherhood was entitled to assert that the grievor was unjustly dealt with. It submits, however, that the process available in respect of that claim is limited to possible settlement following discussion of the employee's complaint under the grievance procedure, and does not extend to a submission to arbitration for final and binding adjudication.

In a number of cases boards of arbitration have been called upon to consider the scope of procedural redress available under a collective agreement to an employee who alleges no violation of a specific right, benefit or obligation under a collective agreement, but asserts that he or she has been "unjustly dealt with" in some respect not specifically covered by any provision of the collective agreement.

The article 24.21 issue raised in the instant case is similar to that considered by the board of arbitration in **CN Telecommunications CN Telecommunications-Telegraph Workers Local 43** (1975) 11 L.A.C. (2d) 152 (Rayner). In that case, as in the case at hand, an employee was entitled to file a grievance if he or she felt "unjustly dealt with" even though no provision of the collective agreement was violated. The board of arbitration concluded that such a complaint was not arbitrable. Professor Rayner commented, in part, as follows:

> In our opinion, Article 21 provides for the bringing of grievances where unfair treatment is alleged. However, if those grievances are to be pursued to arbitration, the unfair treatment must be found on some alleged violation of the Collective Agreement apart from Article 21. Indeed, Article 22 provides that a matter cannot be arbitrated that is not covered by the agreement.

The same reasoning has been applied consistently over the years to the collective agreement between the Corporation and the Brotherhood by arbitrators in this Office. In **CROA 924** Arbitrator Weatherill dealt with a claim by the Brotherhood, made against the Corporation, that an employee had been unjustly dealt with where the failure to provide a locker had allegedly resulted in the loss of her personal property. There was no obligation on the employer to provide lockers under the terms of the collective agreement. Arbitrator Weatherill found the grievance to be inarbitrable, and commented as follows:

> While the Collective Agreement provides that a grievance may be filed where employees claim that they have been "unjustly dealt with", that phrase is to be understood in the context of the grievance procedure under the Collective Agreement. What was said by the Arbitrator in the *CN Telecommunications Case*, 11 L.A.C. (2d) 152 (Rayner) with respect to the phrase "unfair treatment" in a similar Collective Agreement provision, applies equally here.
>
> In any event, even if it were open to the employee to grieve in this respect, such a grievance may not proceed to arbitration. By Article 25.2, grievances "concerning the interpretation or alleged violation of this agreement or an appeal by an employee that he has been unjustly disciplined or discharged" may be referred to arbitration. This is not such a case.
>
> For the foregoing reasons, the grievance is not arbitrable and must be dismissed.

In subsequent cases, including **CROA 2157** and **2235**, which also involved the Corporation and the Brotherhood, the reasoning in **CROA 924** was followed, and it was concluded that grievances founded on the bare allegation that an employee was "unjustly dealt with" can be processed through the grievance procedure, but cannot be taken to arbitration. Significantly, notwithstanding the settled interpretation of articles 21 and 25 of their collective agreement issuing from this Office, the parties have made no material change to the language of those provisions in subsequent renegotiations of the collective agreement. They must, therefore, be taken to have accepted that interpretation as part of their current collective agreement.

The principles which underlie the above noted cases are well reflected in the decision of Arbitrator Christie in a case involving **Canada Post Corporation and the Canadian Union of Postal Workers** (unreported award dated August 10, 1988) where, as in the **CN Telecommunications Case**, it was contended by the union that the right of an employee to file a grievance that he or she had been unjustly dealt with implied the right to have such a complaint arbitrated.

The Canada Post case concerned the discharge of a casual employee. The collective agreement conferred on casual employees a number of rights, including the right to file a grievance. It specifically excluded them, however, from the protection against discipline, suspension and discharge for other than just cause which covered permanent employees under article 10 of the collective agreement. The union in **Canada Post** argued that the arbitrator had jurisdiction to entertain the casual employee's discharge grievance by virtue of the provisions of the grievance procedure contained in the collective agreement. The articles of the collective agreement relied on by the union, and considered by Professor Christie, included the following:

> **9.06 Right to Present a Grievance**
> An authorized representative of the Union may present a grievance if he believes that an employee, a group of employees, the employees as a whole or the Union have been aggrieved or **treated in an unjust and unfair manner.**
>
> **9.07 Right to Present a Policy Grievance**
> An authorized representative of the Union may present a policy grievance in order to obtain a declaratory decision. Without restricting the generality of the above, a policy grievance may be presented in the following cases:
>
> > **(a)** where there is a disagreement between the Corporation and the Union concerning the interpretation or the application of the Collective Agreement.

> **(b)** where the Union is of the opinion that a policy, directive, regulation, instruction or communication of the Corporation has or will have the effect of contravening any provision of the Collective Agreement, of causing prejudice to employees of the Union or of **being unjust or unfair to them. ...**
>
> **9.29** When a grievance has been presented to the final level and has not been dealt with to the satisfaction of the Union, the Union may refer such grievance to arbitration if it is a complaint concerning
>
> **(i)** the interpretation, application or alleged violation of the Collective Agreement, including any disciplinary measure and termination of employment,
>
> **(ii)** any alteration of an existing working condition concerning the payment to an employee of a premium, an allowance or other financial benefit, or any discriminatory application of such premium, allowance or financial benefit.
>
> [emphasis added]

In considering the Union's position, Arbitrator Christie noted a prior award, the **Heywood** grievance, between the same parties issued by Arbitrator Norman, and his analysis of the case law, including the decision of the Supreme Court of Canada in **Re the Queen in Right of New Brunswick and Leeming** (1981), 118 D.L.R. (3d) 202. In reviewing that case, and the **Norman** award, Professor Christie relates the following:

> A significant portion of the text of the award in *Heywood* is given over to discussing the analogy between the position of a casual employee under this Collective Agreement and that of the probationary employee considered in *Re the Queen in Right of New Brunswick and Leeming et al.*, (1981), 118 D.L.R. (3d) 202 (S.C.C.). In that case an adjudicator under the New Brunswick Public Service Labour Relations Act had held that a probationary employee not only had a right to grieve by virtue of that statue but was also protected against discharge without cause, regardless of the terms of the Collective Agreement. However, Martland J., speaking for the Supreme Court of Canada, concluded that the relevant sections of the New Brunswick Public Service Labour Relations Act "do not purport to confer substantive rights upon employees in addition to their rights as defined in the Collective Agreement" (at pp. 206-7). Arbitrator Norman's closing comments in the *Heywood* award relate to this aspect of *Leeming*,. he says, at p. 8:
>
> > When a Collective Agreement purports to disentitle an employee, whether a probationer as in *Leeming*, or a casual, as in this case, to a substantive right to grieve a termination, is a procedural right of access to the grievance procedure, elsewhere given, of any avail to the employee? The Supreme Court's answer was in the negative. And so is mine.

Professor Christie was called upon to determine whether the right of the union to grieve that a casual employee had been "treated in an unjust manner" was a procedural right, or whether it also created a substantive right of the casual employee, the alleged violation of which could be taken to arbitration for redress. Firstly he concluded that the prior award of Arbitrator Norman in the **Heywood** grievance was persuasive authority for the proposition that while articles 9.06 and 9.07 gave the union access to the grievance procedure on behalf of any employee "... [they] are ineffective to create substantive rights in casual employees." Further, at p. 21-22, Professor Christie concluded:

> Quite apart from the binding effect of *Heywood*, I cannot interpret Article 9.06, Article 9.07 or Article 9.29 as creating any substantive rights, in casual employees or anyone else. Article 9.06 entitles an authorized representative of the Union to "present a grievance" in certain circumstances. Those circumstances are:
>
> > If *he believes* that an employee, or a group of employees, the employees as a whole or the Union have been aggrieved or treated in an unjust or unfair manner.
>
> This provision of the Collective Agreement simply entitles the presentation of a grievance. In the context of the inclusion in the Collective Agreement of Article 9.29, Article 9.06 cannot even be read as defining what may go to arbitration, let alone what the grievor's rights are. The plain words simply do not entitle the grievor to access to arbitration simply because of the belief of the

> authorized representation [sic] of the Union that gets the matter into the grievance process. More is required by Article 9.29 to get the matter to arbitration.
>
> The same statement may be made with respect to Article 9.07(b) where the condition necessary for a policy grievance to "be presented" is that "the Union is of the opinion that a policy, directive, regulation, instruction or communication of the Corporation" will contravene a provision of the Collective Agreement or cause prejudice to employees or the Union, or be unjust or unfair to them. If the intention of the parties was that satisfaction of this condition created a substantive right it should have said so, rather than merely providing where the condition is satisfied the grievance "may be presented".
>
> It is virtually impossible to even frame an argument that Article 9.07(a) creates a substantive as contrasted to a procedural right. It simply allows a policy grievance to be presented wherever there is disagreement between the Employer and the Union "concerning the interpretation or application of the collective agreement". This buttresses my conclusion that Article 9.06 and Article 9.07(b), which run parallel to Article 9.07(a), do not create substantive rights either.
>
> [original emphasis]

Finally, the learned arbitrator concluded that article 9.29 also reflected the agreement of the parties that only substantive rights should be arbitrable, and commented on the unworkability of the union's position, which would virtually create rights at large without reference to any objective standards in the text of the collective agreement. At pp. 23-24 Professor Christie further stated:

> As a matter purely of language, Article 9.29(i) does not say that any complaint concerning "termination of employment" may be referred to arbitration, it says any complaint concerning "the interpretation, application, or alleged violation of the collective agreement" may be referred to arbitration and, apparently for greater clarity, says that that larger category includes "any disciplinary measure and termination of employment." As a matter of language, then, grievances about disciplinary measures and terminations of employment were apparently envisioned by the parties as concerning "the interpretation, application or alleged violation of the collective agreement"; that is as involving an alleged breach of substantive rights.
>
> Suppose that disciplinary measures or terminations of employment did not necessarily involve the interpretation, application, or alleged violation of the collective agreement but could, by Article 9.29(i), be referred to arbitration. What would a rights arbitrator do with such a grievance? By Article 9.39 an arbitrator under this Collective Agreement is empowered to grant whatever remedy or compensation he or she deems appropriate "where the arbitrator comes to the conclusion that the grievance is well founded ...". Surely to find that a disciplinary measure or termination of employment is "well founded" an arbitrator must find that it involves a violation of **some** substantive right in the grievor. To say this is simply to demonstrate that the function of Article 9.29(i) is not to create any standard against which an arbitrator can judge a grievance but to grant access to the arbitration process. Article 9.29(i) creates procedural rights, not substantive rights.

In the result, for reasons which in my view are fully consistent with the decision of Professor Rayner in **CN Telecommunications** and the prior awards of the Canadian Railway Office of Arbitration cited above, Professor Christie concluded that the right of the union to file a grievance alleging that an employee was treated unjustly by Canada Post did not confer a substantive right, and found that the grievance before him was not arbitrable.

In the Arbitrator's view the industrial relations rationale for the above line of arbitral interpretation is fairly obvious. When a trade union is certified as the exclusive bargaining agent of employees under the **Canada Labour Code**, or under a provincial labour relations statute, the purpose of the certification is to enable the union and the employees it represents to achieve the negotiation of a collective agreement governing, with some degree of certainty, the terms and conditions of employment of the employees represented by the union. The collective agreement becomes the central document of the bargaining relationship. Pursuant to the terms of the **Code** and similar provincial statutes, binding arbitration becomes the ultimate means of adjudicating unresolved disputes between the parties with respect to the interpretation or alleged violation of the substantive terms of their collective agreement. While parties may agree to allow complaints which are unrelated to the substantive rights and obligations articulated in the collective agreement to be filed and aired for possible settlement in the grievance procedure, they

should not, absent clear and unequivocal language, be taken to have intended that such general allegations or complaints can proceed to arbitration. To conclude otherwise is to invite disputes and to promote litigiousness in a manner inconsistent with the purposes of the **Canada Labour Code** and the most fundamental principles underlying collective agreements in Canada which are intended to promote industrial relations peace and stability.

The Brotherhood asserts that in the case at hand the Arbitrator is bound by two decisions of the Quebec Superior Court quashing prior awards of this Office. They involved separate collective agreements between the Brotherhood of Maintenance of Way Employees and Canadian Pacific Limited (decision dated January 22, 1993) and an earlier decision of the Court (dated February 13, 1992) between the Brotherhood of Maintenance of Way Employees and Canadian National Railway. Those decisions are presently under appeal.

In the Arbitrator's view, without commenting on the merits of the two cases, the language of the collective agreement at hand is different from that which appears in the agreements which were the subject of Court review, involving the Brotherhood of Maintenance of Way Employees. On that basis alone, the Arbitrator cannot find that they are binding for the purposes of the differently worded collective agreement in the case at hand. Moreover, as noted above, the parties in the instant case have renewed their agreement without change in the full knowledge of the binding interpretations of their agreement rendered in previous cases.

Under the instant collective agreement the kind of disputes which may be referred to this Office for determination through the arbitration process is clearly defined in article 25.2 of the agreement, which in my view bears repeating. That provision is as follows:

> **25.2** A grievance concerning the interpretation or alleged violation of this Agreement or an appeal by an employee that he has been unjustly disciplined or discharged and which is not settled at Step 3, may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work in accordance with the regulations of that office.

It would, of course, have been open to the parties to provide simply that any grievance or appeal not settled at Step 3 may be referred to this Office. However, they did not. This grievance does not involve an appeal that Mr. Mills has been unjustly disciplined or discharged. And to the extent that it rests on the assertion that Mr. Mills has been "unjustly dealt with", by the agreement of the parties, it does not fall within the purview of those matters which can be pursued to arbitration. Therefore, that part of the grievance alleging that the grievor was "unjustly dealt with" within the contemplation of article 24.21 must be found to be inarbitrable.

However, the foregoing conclusion does not fully dispose of the arbitrability of the grievance. It is trite to say that a board of arbitration should, insofar as possible, deal with the substance of a grievance, and avoid excessive technicality which would frustrate the resolution of a genuine dispute under a collective agreement. In the instant case the original grievance, filed by Mr. K. Sing, the Local Chairperson of the Brotherhood alleges, in part: "... Mr. Mills is being held of out of service for no justifiable reason and I would request that he be permitted to return to work effective immediately and compensated for all lost wages and benefits."

In the Arbitrator's view, the foregoing statement grounds an arbitrable claim. It is an implied term of any collective agreement that an employee who has been justifiably absent due to illness, injury or other medical incapacity is, as a general matter, entitled to return to work when he or she is medically fit to do so. Disputes between employers and unions with respect to the fitness of an employee to return to work are commonly heard and disposed of in this Office. (*See, e.g.*, ***CROA 2190***).

While it is true that the position developed by the Brotherhood in the course of the grievance procedure tended to place the greatest emphasis on the objection that the grievor was "unjustly dealt with", a careful review of the documentation confirms that the position originally articulated by Mr. Sing, reproduced above, has never been abandoned. A reading of the dispute and statement of issue filed by the Brotherhood confirms its continuing position that Mr. Mills has been wrongfully denied access to employment under the collective agreement by reason of a dispute about his medical or physical capacity. In the Arbitrator's view the grievance, so characterized, must be viewed as arbitrable, and it is so found. The effect, if any, of the **Canadian Human Rights Act** on the rights of the grievor under the collective agreement may also be addressed when the dispute is heard upon its merits.

The matter is therefore referred to the General Secretary for continuation of hearing.

May 20, 1993

(signed) MICHEL G. PICHER
ARBITRATOR

On Thursday, 15 July 1993, there appeared on behalf of the Corporation:

D. S. Fisher	– Senior Negotiator & Advisor, Labour Relations, Montreal
J. R. Kish	– Senior Advisor, Labour Relations, Montreal
C. Rouleau	– Senior Officer, Labour Relations, Montreal
Dr. M. Pigeon	– Witness

And on behalf of the Brotherhood:

T. Barron	– Representative, Moncton
R. J. Dennis	– Local Chairperson, Moncton
J. S. Mills	– Grievor

AWARD OF THE ARBITRATOR

The Arbitrator directs that Mr. Mills be reinstated into his employment, without compensation and without loss of seniority, with his assignments to be restricted to the position of chef. His reinstatement is conditional upon his undertaking, for a period of not less than two years, the duties and responsibilities of a chef in On-Board Services, on a trial basis. If, for any quarterly period during the course of the two years, Mr. Mills should fail to register attendance comparable to the average of other employees in his classification in VIA Atlantic, the Corporation shall be entitled to consider his reinstatement into that trial service as at an end. Should that occur the parties will be in a position to consider and exercise such rights and obligations as may then apply to Mr. Mills under the terms of the collective agreement. The Arbitrator retains jurisdiction.

July 16, 1993

(Signed) MICHEL G. PICHER
ARBITRATOR