

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2384

Heard at Montreal, Thursday, 15 July 1993

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

An alleged violation of Appendix D of Collective Agreement No. 1. and Appendix 6 of Collective Agreement No. 2 from the VIA Atlantic Region.

JOINT STATEMENT OF ISSUE

On February 19, 1992, the Corporation posted throughout the VIA Atlantic Region a training bulletin inviting applications for training in French as a second language.

The Brotherhood objected to the content of the training bulletin. The Brotherhood contends that, in the past, the parties met for the purposes of negotiating and concluding an understanding under the provisions of Appendix D and Appendix 6 and that, in this instance, a mutual arrangement was not reached, contrary to those provisions. The Brotherhood further contends that the 40 hours' bonus of the employee's basic rate for successful completion of training is not necessarily proper payment for employees while in training in accordance with Appendices D and 6 of Agreements 1 and 2 respectively. The Brotherhood request that the Training Bulletin of February 19, 1992 posted throughout the VIA Atlantic Region be canceled, and that if a need arises to have language training that said training be conducted as "classroom" training, rather than "home study", in conformity with Appendices D and 6, as mutually arranged.

The Corporation denies violating Appendix D in Collective Agreement No. 1 or Appendix 6 in Collective Agreement No. 2.

The Corporation does not believe that the manner in which training is delivered is a matter for negotiation and never has been. The Corporation believes that the reference to mutually arranged in the appendices refers to seniority order in which the training will be given, not the training program content or methodology. The Corporation also believes that its method of compensation is in accordance with the appendices of the collective agreements.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Rouleau	- Senior Officer, Labour Relations, Montreal
D. Fisher	- Senior Negotiator & Advisor, Labour Relations, Montreal
J. Kish	- Senior Advisor, Customer Services, Montreal

There appeared on behalf of the Brotherhood:

T. E. Barron - Representative, Moncton
R. J. Dennis - Local Chairperson, Moncton

AWARD OF THE ARBITRATOR

Appendix 6 of Collective Agreement No. 2 and Appendix D of Collective Agreement No. 1 are virtually identical in their provisions with respect to the promotion of bilingualism within the service of the Corporation. Those appendices contain a number of provisions, including the following:

A Regional approach will be utilized for identifying and providing the bilingual requirements of the Corporation in order to serve the traveling public. On or about September 1, 1987 and on a yearly basis thereafter, Regional representatives of the Brotherhood and the Corporation will meet to establish the bilingual needs for their respective Regions for the ensuing twelve months.

...

A language training bulletin will be posted twice per year for a 15-day period, inviting applications from employees desiring to qualify in the bilingual requirements for positions covered by this Agreement. Unilingual employees will be given language training in seniority order, or as mutually arranged. Employees undergoing language training will be paid at the classification rate of pay last worked immediately prior to taking such training.

On February 19, 1992 the Corporation posted the following bulletin to the attention of employees in the VIA Atlantic region:

TO: ALL EMPLOYEES, COLLECTIVE AGREEMENTS 1 AND 2 (CBRT&GW)
SUBJECT: LANGUAGE TRAINING

In accordance with Appendix 6 of Collective Agreement No. 2 and Appendix D of Collective Agreement No. 1, applications for language training, French as a second language, will be received in writing up to midnight, March 04, 1992.

The course is a distance education program where the participants learn on their own time through the use of a student guide, video cassettes, and audio cassettes. Participants will have access to a tutor to assist them in their learning. Upon successful completion of this specific course (passing mark of 70%) participants will receive the equivalent of 40 hours of their basic rate.

All requests must be sent to the Regional Human Resources office.

The Brotherhood objects to the notice so posted, and to the program which was instituted in pursuance of it, on a number of grounds. Firstly, it submits that the bulletin issued without any consultation with the Brotherhood in accordance with the first paragraph of appendices 6 and D, respectively. Secondly, the Brotherhood submits that the training program in question must be classroom training, rather than home study. Thirdly, it submits that opportunities to pursue the language training must be available to all employees, subject only to seniority, and that the Corporation violated the collective agreement by restricting access to the bulletined language training program to "out front" employees, meaning persons whose duties and responsibilities involve ongoing contact with the public. Lastly, the Brotherhood objects that there was no negotiation with the bargaining agent with respect to the remuneration of employees participating in the home study program.

The material before the Arbitrator further discloses that the Corporation executed a memorandum of agreement with the Brotherhood in respect of the designation of bilingual positions pursuant to the two appendices on January 27, 1988 the terms of which were effective from April 1, 1988. That agreement contains a number of provisions, including the designation of certain bilingual positions in off-train and on-train service as well as provisions regarding training. Article 3 of the memorandum reads as follows:

3 It is further agreed that:

(a) a language training bulletin will be issued twice a year when training opportunities are made available by the Corporation. The Regional Vice-President of the Brotherhood will be

provided with copy of such bulletin. Employees will be asked to send copy of their applications to the Local Chairperson.

(b) the Local Chairperson of the Brotherhood will, along with local management officers, meet to review and discuss applications to the language training bulletin as outlined in (a) above. Such review to result in recommendations for candidates for training to the Regional Vice-President of the Brotherhood and the proper Regional Officer of the Corporation in accordance with paragraph 3 of Appendix D and Appendix 6.

(c) Mutually agreed recommended candidates will then be referred to the Manager of Language Training for the Corporation for their assessment as to the level of proficiency and the homogeneity of such candidates for inclusion in present or future training classes.

There appears to be some disagreement between the parties as to the present status of the memorandum of agreement of January 27, 1988. The Corporation's representative suggests that following the substantial reduction in service occasioned by federal government funding cuts in 1989, the Brotherhood's regional vice-president indicated to the Corporation that the Brotherhood would not seek to enforce the terms of the memorandum of agreement. While the representatives of the Brotherhood present at the hearing did not agree with that representation, it appears to the Arbitrator that little turns upon it. Nothing in the memorandum of agreement which bears on the merits of the grievance before me is different, in substance, from the provisions of appendices 6 and D of the respective collective agreements. The memorandum appears to be an elaboration or amplification of the application of the appendices for the purposes of VIA Atlantic, and does not significantly deviate from the substantive requirements of the appendices. In the result, I am satisfied that the grievance must, in any event, stand or fall on the merits of the alleged violation of Appendix D of Collective Agreement No. 1 and Appendix 6 of Collective Agreement No. 2. That, moreover, is the issue presented in the Joint Statement of Issue and under the rules of this Office, constitutes the limit of the dispute which I have jurisdiction to resolve.

Certain aspects of the grievance are not compelling. The material before me establishes, beyond substantial contradiction by the Brotherhood, that from the inception of the Corporation's bilingualism program, the terms of which were negotiated with the Brotherhood as early as 1985, it was always understood between the parties that certain practical business considerations would come to bear in the administration of the program. Among other things, it was agreed that the positions designated bilingual would be "out front" positions and the training opportunities would be provided, on a seniority basis, to employees working in those classifications. Other considerations included the proximity of a candidate for training to retirement, as the utility of expending training funds without the prospect of future rewards was apparent to both parties. It is on that basis, in part, that the proviso for mutual agreement, as an alternative to the automatic assignment of employees to training in seniority order, was included in the language of the appendices.

Lastly, it does not appear disputed that from the inception of the Corporation's bilingualism program the alternative of home study was made available to employees, quite apart from the classroom training programs which were instituted. Although the specific tutor assisted program which is the subject of the bulletin of February 19, 1992 may not have been available, for a number of years there has been some form of home training program provided to employees, on a voluntary basis, by the Corporation. I am satisfied, on balance, that that arrangement proceeded with the knowledge and tacit agreement of the Brotherhood.

I must agree with the Corporation that there is nothing in the terms of the appendices which contemplates that the consultation between the Corporation and the Brotherhood is to involve the format or content of any language program being offered. As the employer's representative points out, the document speaks in terms of identifying bilingual needs and, either by seniority or by mutual arrangement, selecting employees who are to receive language training. The Arbitrator cannot, therefore, find any departure from the terms of the appendices in the decision of the Corporation, without consultation with the Brotherhood, to shift its bilingualism program chiefly from a classroom format to a home study system. Nor, given the background reviewed above, can I see any departure from the understanding of the parties in the fact that the opportunities for home training were provided to "out front" employees on a seniority basis. That, it would appear, is consistent with the long established understanding and practice in relation to the prior administration of the appendices.

There is, however, one aspect of the evidence which gives the Arbitrator serious pause. It is common ground that the arrangement for the payment of employees who participate in the home study program was established

unilaterally by the Corporation. As reflected in the bulletin, the payment of wages to employees who participate in the program is contingent upon their successfully completing it. Those who pass the course are paid the equivalent of forty hours at their basic rate. Those who do not pass are entitled to no payment, notwithstanding the time expended in the course. The Arbitrator makes no comment on the fairness or appropriateness of that system of remuneration in a general sense. What is of obvious concern, however, is that it is plainly not in keeping with the provision for payment reflected within the language of Appendix 6 and Appendix D of the respective collective agreements. It is common ground that since the inception of those provisions employees selected for training pursuant to the semi-annual bulletins have been paid for the time spent in formal training, regardless of the success or failure of their endeavours.

It is a cornerstone principle of collective bargaining that where terms and conditions of employment, including wages, are reflected within the provisions of a collective agreement, there is no scope for the unilateral determination of wages by the employer, or their separate negotiation on an independent basis with individual employees. Under the **Canada Labour Code**, and indeed under article 2 of the collective agreements, the Corporation is compelled to recognize the Brotherhood as the sole bargaining agent of all employees with respect to their wages, hours of work and other working conditions. Given the express provision for training wages found in the appendices, while it may have acted in good faith, there is, very simply, no scope for the Corporation itself to fashion a different remuneration scheme for a training program, without the agreement of the bargaining agent (*McGavin Toastmaster Ltd. v. Ainscough* (1975) 54 D.L.R. 3(d) 1 (S.C.C.)).

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds and declares that the Corporation violated the terms of appendices D and 6 of collective agreements 1 and 2, respectively by failing to compensate employees in the home training program in accordance with the terms of the appendices, and by failing to obtain the agreement of the Brotherhood to the alternative method of remuneration which was applied. Having regard to the Brotherhood's request with respect to remedy, the Arbitrator remits this matter to the parties for the purposes of fashioning the most appropriate remedial outcome. As requested, the Arbitrator retains jurisdiction in the event of the inability of the parties to reach an agreement in that regard.

July 16, 1993

(Sgd.) MICHEL G. PICHER
ARBITRATOR