CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2399

Heard at Montreal, Tuesday, 12 October 1993

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

A time claim for three hours at time and one-half for the two senior off-duty locomotive attendants at Halifax.

JOINT STATEMENT OF ISSUE:

On March 26, 1992, CN operating crews performed switching of VIA equipment in and around the Halifax Maintenance Centre.

The Brotherhood believes that this was a violation of Article 2.4 and Appendix C of Collective Agreement No. 1. The Brotherhood believes that there was ample time and space to have that work performed by VIA Locomotive Attendants. The Brotherhood asks that the two senior off-duty Locomotive Attendants be paid three hours each at overtime rates.

The Corporation denies violating the collective agreement. The Corporation believes that the circumstances surrounding this incident were exceptional and represented an emergency as contemplated in Appendix C. Notwithstanding that, the Corporation does not believe that Collective Agreement No. 1 confers any proprietary rights to this work to members of the bargaining unit. The Corporation also maintains that the work involved exceeded the limits of the derail at the Halifax Maintenance Centre and, therefore, the VIA locomotive attendants were not permitted to perform the work as they are not qualified to operate outside the yard limits of the Maintenance Centre. Finally, the Corporation does not believe that there was any obligation in the collective agreement to assign the work in question on an overtime basis.

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:

C. Rouleau	– Senior Officer, Labour Relations, Montreal
C. Pollock	– Senior Officer, Labour Relations, Montreal
J. R. Kish	– Senior Advisor, Labour Relations, Montreal
P. Barnes	– Service Shop Foreman, Halifax
R. Adams	– Senior Officer, Operations Performance, Halifax

And on behalf of the Brotherhood:

G. T. Murray	– Regional Vice-President, Moncton
T. Barron	– Representative, Moncton

AWARD OF THE ARBITRATOR

The first leg of the Brotherhood's claim is made under article 2.4 of the collective agreement which provides as follows:

> **2.4** The Corporation also accepts that the main function of Supervisors is to direct the work force. Supervisors and employees outside this bargaining unit should not engage, normally, in work currently or traditionally performed by employees in this bargaining unit.

In the Arbitrator's view the foregoing article speaks to circumstances different from those found in the case at hand. There is no allegation, and indeed it is agreed, that the work which is the subject of this dispute was not assigned to supervisors or to employees of the Corporation who fall outside of the Brotherhood's bargaining unit. As the evidence indicates, the work in question, the assembling of Train No. 11, scheduled to leave Halifax, Nova Scotia on March 27, 1992 was contracted out to CN Rail, whose running trades employees were utilized. In the result, the grievance must stand or fall on the merits of the alternative allegation of the Brotherhood, which is that the Corporation violated Appendix C of the collective agreement, which limits its right to contract out work "presently and normally performed by employees represented by the Brotherhood ...".

In relation to the allegation of contracting out two issues arise: firstly, whether the work in question falls within the description of work "presently and normally performed by employees represented by the Brotherhood"; and, secondly, assuming that the answer to the first issue is in the affirmative, whether the Corporation was nevertheless justified in contracting out by virtue of the exceptions provided in Appendix C, which are as follows:

> 1. when technical or managerial skills are not available from within the Railway; or
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> 2. where sufficient employees, qualified to perform the work, are not available from the active or laid-off employees; or
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> 3. when essential equipment or facilities are not available and cannot be made available from Railway-owned property at the time and place required; or
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> 4. where the nature or volume of work is such that it does not justify the capital or operating expenditure involved; or
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> 5. the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or
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> 6. where the nature or volume of the work is such that undesirable fluctuations in employment would automatically result.

The material facts are not disputed. Train No. 11, scheduled to depart Halifax on March 27, 1992, was to be composed of the cars which comprised Train No. 14, the Transcontinental, arriving in Halifax from Montreal on March 26, 1992. At or about 0400 hours on March 26, 1992 Train No. 14 derailed. As a result, its cars were unable to reach Halifax to be turned around as Train No. 11. It therefore became necessary to make up Train No. 11 from equipment in various stages of servicing then in the Halifax yard, for departure the next day. The fact that the incoming equipment would not be available was known to the Corporation only at approximately 1000 hours, at which point a decision was made with respect to the method to be used to assemble Train No. 11. The train was to be made of a consist of eleven cars which were located in various tracks throughout the Halifax yard. In accordance with regular procedure, the assembled consist had to be serviced for departure the next day during the evening shift of March 26.

It is common ground that the locomotive attendants represented by the Brotherhood normally, and regularly, move passenger cars within the Corporation's yard at Halifax. They generally do so for the purposes of facilitating the servicing of the cars. By reason of their limited CROR qualifications, locomotive attendants cannot move any equipment beyond the limits of the yard derail.

Much of the dispute concerns whether the locomotive attendants could have performed the work in a timely manner, given the limitations on the number of cars which they are able to move at any one time, because of the location of the derail. On this matter the material presented the parties is in stark contrast. The Brotherhood's representative submits that the work might have been completed in a period of two and one-half hours, leaving ample

time for the servicing and preparation of Train No. 11 for departure on the morning of March 27. Two witnesses who attended the hearing and gave evidence on behalf of the Corporation express a sharply different view. Mr. Pat Barnes, the Service Shop Foreman at Halifax, estimates that substantially more than two and one-half hours would have been required to make the moves necessary to assemble the consist, if the work was to be done by locomotive attendants who are unable to move beyond the limits of the derail. By his estimate, the work in question would have required better than eight hours, and would have jeopardized the ability of the Corporation to service and prepare the consist for departure the next day.

In the case at hand the Brotherhood bears the burden of proof. On a review of the material and evidence before me, I cannot find that it has discharged the burden of establishing that locomotive attendants, either those on duty or persons who might have been called on an overtime basis, could have performed the moves necessary to assemble the consist in a timely fashion. Any contrary conclusion is made particularly difficult by the apparent confusion in the mind of the Brotherhood's member who prepared a written estimate of the moves that would be required to accomplish the assembling of the consist. It would seem that the individual in question reversed the order of the cars that would comprise the final composition of the train. If the evidence of Mr. Barnes, whom the Arbitrator judges to be a credible witness, is accepted, that estimate is highly unrealistic.

Based on the material before me it is, at best, a doubtful question as to whether the marshalling of trains within the yard can fairly be said to be work presently and normally performed by locomotive attendants, within the contemplation of Appendix C of the collective agreement. I deem it unnecessary to draw any conclusion with respect to that issue, as I am satisfied that even if it were so, the Corporation was justified in taking the view that the emergent circumstances necessitated contracting the work in question to CN Rail, whose employees were able to move substantially larger cuts of cars, and to proceed beyond the limits of the derail to assemble Train No. 11 in sufficient time for it to be serviced overnight and made ready for departure the following morning. I am satisfied, on balance, that the circumstances disclosed fell within the exceptions described in paragraphs 2 and 5 of Appendix C.

For the foregoing reasons the grievance must be dismissed.

October 15, 1993

(signed) MICHEL G. PICHER
ARBITRATOR