CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2590

Heard in Montreal, Tuesday, 14 March 1995

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

A policy grievance concerning the Corporation's application of calling procedures for employees on employment security status.

JOINT STATEMENT OF ISSUE:

Following the train service reductions of January 15, 1990, the Corporation implemented calling procedures for employees on employment security status. The Corporation revised these procedures effective July 1, 1990.

The Union grieved and that grievance proceeded to arbitration. The case was heard at the CROA on November 14, 1990 and again on February 13, 1991. On February 15, 1991, the decision in CROA Case no. 2074 was issued. That award found that "... the calling procedures ... are not in violation of the collective agreement."

The Corporation continued to apply the calling procedures in accordance with the decision in CROA Case No. 2074.

On February 14, 1992, the CROA issued its decision for Case No. 2215, where it was found that the Corporation had violated the collective agreement when it removed L. Leblanc from employment security status after she refused a recall to work under the calling procedures.

On March 31, 1992, F. Bisson filed a policy grievance at Step one of the grievance procedure, on behalf of all employees who had lost their employment security status from January 15, 1990 until February 14, 1992.

The Union contends that the Arbitrator's decision in CROA 2215 overrides his decision in CROA 2074 as a result of the Supplementary Award to CROA 2215.

The Union requests that all employees who lost their employment security status under the same or similar circumstances as the grievor in CROA 2215, between the period of January 15, 1990 until February 14, 1992, be reinstated to employment security retroactively and be paid any wages and/or benefits lost, and returned to their home terminals in accordance with the Special Agreement, if they relocated.

The Corporation declined the grievance at all steps of the grievance procedure as it was untimely. The Corporation contests the arbitrability of this dispute.

FOR THE UNION:	**FOR THE CORPORATION:**
(SGD.) A. S. WEPRUK	**(SGD.) D. S. FISHER**
NATIONAL COORDINATOR	**FOR: DEPARTMENT DIRECTOR, LABOUR RELATIONS AND HUMAN RESOURCES SERVICES**

There appeared on behalf of the Corporation:

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

And on behalf of the Union:

A. S. Wepruk	– National Coordinator, Montreal

AWARD OF THE ARBITRATOR

There is some validity to the position advanced by the Union that **CROA 2215** tended to override the decision previously rendered in **CROA 2074**. In the Arbitrator's view, however, that conclusion does not change the mutual rights and obligations of the parties under their collective agreements with respect to the timeliness of grievances.

In the Arbitrator's view it is worth recalling a portion of the analysis made by this Office in **CROA 2215**, whereby it was found that the grievance filed by Ms. Leblanc must be allowed. The Arbitrator commented, in part, as follows:

> The analysis and conclusions drawn in this grievance differ from those found by this Office in **CROA 2074** which also dealt with calling procedures. In that case, however, the documentary evidence, which has been reexamined in detail, did not include either the letter to the Brotherhood from the Corporation's Manager of Labour Relations of December 19, 1989, or the December 15, 1989 communication to the Brotherhood. Those documents, coupled with the oral testimony heard in these proceedings, compel the Arbitrator to adopt a different conclusion as regards the merits of Ms. LeBlanc's claim to a violation of the collective agreement and the understanding between the parties with respect to her calling obligations to preserve her employment security. In coming to that conclusion I am persuaded by the letter of the Manager of Labour Relations which, on its very face, describes the procedure for filling bulletined positions "... in accordance with the Memorandum of Agreement ...". It should be stressed in that in so finding I make no adverse conclusion with respect to the good faith of the Corporation or its officers who, it is agreed, faced a process of some complexity and uncertainty at a time when the Corporation was forced to alternate the individuals responsible for the negotiation and implementation of the Special Agreement.
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> The evidence before the Arbitrator establishes that at the critical time, when the employees were required to make their selection under the Special General Bid to protect their employment as of January 15, 1990, the Corporation represented to them, and to the Brotherhood's officers, that they would not be compelled to move from one region to another to fill vacancies arising after January 10, 1990, unless such a vacancy remained unfilled following the normal bidding process and the depletion of the regional employment security list. That representation was clearly made in such a way as to be relied upon by the Brotherhood representatives in advising their members, and by employees in the position of Ms. Leblanc seeking to protect themselves in the Special Bid. In the Arbitrator's view it would be inequitable for the Corporation to later resile from its undertaking which, as I have found, was part of its agreement with the Brotherhood. It would plainly be a violation of the collective agreement and the Special Agreement as agreed between the parties. On that basis the grievance of Ms. Leblanc, **filed in a timely manner**, must succeed on its merits.(emphasis added)

As can be seen from the foregoing, an essential aspect of the claim brought on behalf of Ms. Leblanc in **CROA 2215**, acknowledged in the award, is that her grievance was filed and processed in a timely manner.

It is common ground that the claims which are the subject of this award were filed in the form of a policy grievance on March 31, 1992. On its face, that grievance relates to the treatment of employees in respect of their employment security status during the period between January 15, 1990 and February 14, 1992. The following provisions of collective agreement no. 1 are pertinent to the issue in dispute:

> **24.5** Any complaint raised by an employee concerning the interpretation, application or alleged violation of this agreement shall be dealt with in the following manner; this shall also apply to an employee who believes that he has been unjustly dealt with.
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> Step 1 **Within 21 calendar days from cause of grievance**, the employee and/or the Local Chairperson, or his authorized committeeman, must present the grievance in writing to the immediate Supervisor who will give a decision within 21 calendar days of receipt of grievance.
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> **24.8 Where any grievance is not progressed by the Brotherhood within the prescribed time limits, the grievance will be considered to have been dropped.** When the appropriate officer of the Corporation fails to render a decision with respect to a claim for unpaid wages

> within the prescribed time limits, the claim will be paid, but this will not constitute an interpretation of the collective agreement.
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> Where a decision with respect to a grievance other than one based on a claim for unpaid wages is not rendered by the appropriate officer of the Corporation within the prescribed time limits, it will be processed to the next step in the Grievance Procedure.
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> (emphasis added)

This Office is without jurisdiction to alter or amend the provisions of the collective agreement. Consequently, nothing in **CROA 2074** or **CROA 2215** should be taken as having relieved employees, and their Union, of the obligation to process grievances in a timely fashion. It was at all times open to any employee to take the position that he or she was denied proper treatment under the provisions governing employment security, notwithstanding the result in **CROA 2074**, and to progress such a claim for adjudication on its own merits, as indeed was done in the case of Ms. Leblanc. Claims, such as the claim of Ms. Leblanc, filed in a timely fashion, were obviously entitled to succeed on their merits for the reasons touched upon in **CROA 2215**. However, the Corporation retains the right to insist upon the timely filing and progressing of grievances as mandatorilly provided within the terms of article 24 of the collective agreement.

Based on the foregoing principles, the Arbitrator is satisfied that the grievance at hand is not timely, and therefore is not arbitrable. I am compelled to accept the submission of the Corporation that the claims made on behalf of all of the employees who are the subject of the policy grievance are, at best, 24 days in excess of the time limits permitted by article 24.5 of the collective agreement. It is well settled that employees who follow a certain interpretation or view of the operation of a collective agreement cannot, by reason of a subsequent arbitration award which adopts a different interpretation, avoid the fundamental requirements of timeliness established within the terms of the collective agreement for the purposes of their own claims. That principle was reflected in **CROA 1571** where the following comments appear in response to an argument by the Union that the time limits governing the grievances of employees should be taken to have commenced with the issuing of an arbitration award in which a particular employee's claim was successful:

> The Arbitrator has some difficulty with that submission. It is plainly for the employees and their Union to be vigilant to ensure that their rights under the collective agreement are not violated. The time limits established within the grievance procedure are clearly intended to promote the early identification claims adverse to the Company and to minimize the hardship of dealing with stale claims, or liability extending into an indefinite past.
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> In the instant case Conductor Rector exercised the care and vigilance necessary to protect his rights. The fact that other employees initially went along with the Company's erroneous interpretation does not shelter them from the application of the time limits clearly established within the collective agreement. Nor can the Arbitrator accept the Union's submission that the denial of the second claims refiled by the employees constitutes a fresh violation of the collective agreement from which the time limits are newly to be computed. Plainly the cause of the employees' grievances arose when their initial claims were paid in a manner inconsistent with the provisions of the collective agreement. If the position asserted by the Union were correct there would be little finality to claims under the collective agreement. That is plainly not what the parties intended.
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> For these reasons the grievances must be dismissed.

Any employee who during the period of time covered by the policy grievance claimed that he or she was treated in violation of the terms of the employment security provisions by reason of the Corporation's calling procedures was entitled to file and pursue a grievance, in a timely manner. What the Union seeks to do in the instant case is to effectively create a new timetable for grievances, purportedly based on the decision in **CROA 2215**. For the reasons touched upon above, neither that award nor **CROA 2074** can be taken to have altered or amended the mandatory requirements of the collective agreement with respect to the timely filing and progressing of grievances. As the claims which are the subject of the policy grievance were not filed within 21 days of the cause of the grievance, as contemplated by article 24.5 of the collective agreement, or were not progressed within the prescribed time limits, as contemplated by article 24.8, they must be considered to have been dropped, and therefore not arbitrable.

For the foregoing reasons the grievance must be dismissed.

17 March 1995

(signed) MICHEL G. PICHER
ARBITRATOR