# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2664

Heard in Calgary, Tuesday, 14 November 1995

concerning

## VIA RAIL CANADA INC.

and

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

**DISPUTE:**

Whether Mr. J. Rochon was entitled Supplemental Agreement benefits after being displaced as a result of a non-scheduled employee returning to the scheduled ranks from a management position.

**JOINT STATEMENT OF ISSUE:**

On February 15, 1994, Mr. B. Hamel was released from a temporary management position of Material Analyst. B. Hamel exercised his seniority under article 11.9 of collective agreement no. 1 and displaced Locomotive Attendant R. Miechkota. Mr. Miechkota in turn displaced Locomotive Attendant J. Rochon. Mr. Rochon displaced onto a temporary assignment of locomotive attendant effective that same day.

The Union argues that Mr. Rochon was unjustly denied the benefits flowing out of a notice under article 8.1 of the Supplemental Agreement. The Union argues that due to its past practice, the Corporation is estopped from denying Mr. Rochon those benefits.

The Corporation denies any violation of the Supplemental Agreement. The Corporation believes CROA 2402 supports its position.

**FOR THE UNION:**

**(SGD.) T. N. STOL**
**FOR: NATIONAL COORDINATOR**

**FOR THE CORPORATION:**

**(SGD.) D. S. FISHER**
**FOR: DEPARTMENT DIRECTOR, LABOUR RELATIONS & HUMAN RESOURCES SERVICES**

There appeared on behalf of the Corporation:
D. S. Fisher – Senior Advisor & Negotiator, Labour Relations, Montreal

And on behalf of the Union:
A. S. Wepruk – National Coordinator, Montreal

## AWARD OF THE ARBITRATOR

It is common ground that the grievor, Mr. J. Rochon, was displaced from his employment as a consequence of a chain of displacements caused originally by the release of Mr. B. Hamel from a temporary management position. Although the Union takes the view that in fact Mr. Hamel may have been in a permanent management position, the Joint Statement of Issue is otherwise. In any event, I am satisfied that the principles which apply to the instant case are no different, regardless of whether Mr. Hamel was in a temporary or permanent management position.

An issue similar to that in the case at hand arose in **CROA 2402**, a case involving the Union and Canadian National. In that case, the language of the Employment Security and Income Maintenance Plan was virtually identical to the language of the Supplemental Agreement which is at issue in this case. The Arbitrator there found that there was some ambiguity as to whether the word "employee" in article 8.1 of the ESIMP could be taken to include supervisors. Reference was then had to past practice to resolve the ambiguity. In the result the grievance was dismissed, as the past practice was clearly contrary to the interpretation being advanced by the Union. The Arbitrator commented, in part, as follows:

> What, then, does the evidence with respect to past practice disclose? It is not disputed that over the years there have been hundreds of occasions in which supervisors have returned to bargaining unit ranks because of the abolition of their positions. It appears that the first time the Brotherhood grieved the failure to provide an Article 8 notice in such a case was in **CROA 2023**. For the reasons related above, that grievance was unsuccessful. In the case at hand the Brotherhood can direct the Arbitrator to only three individual cases in which the abolition of supervisor positions, and the return of the supervisor to the bargaining unit ranks, resulted in the Company giving employees who are displaced certain protections under the Employment Security and Income Maintenance Plan, notably maintenance of earnings protection. All three examples cited arose in the context of the Moncton Main Shops, and emanate from the changes implemented in the Purchases & Materials Department in that location in January and February 1988.
>
> ...
>
> In the result, the Arbitrator finds, for the reasons related above, that the practice accepted by the parties, from the earliest years of the ESIMP, reflects their understanding that the Company is not under an obligation to issue an Article 8 notice in relation to the abolishment of a supervisor position. ... Whatever view may be taken of the consequences of the parties' agreement, any change in the face of so long-standing a practice must be made in clear and unequivocal terms within the language of the collective agreement or of the ESIMP, as a result of bargaining. In the absence of any such language, the Arbitrator cannot sustain the position advanced by the Brotherhood.

In the instant case, with one exception discussed below, the Corporation has applied a consistent policy that the displacement of a supervisor back to bargaining unit ranks does not invoke the protections of article 8.1 of the Supplemental Agreement. That practice has not been grieved, and has endured over a number of renewals of the collective agreement. To the extent that past practice is to be looked to, therefore, the preponderance of the evidence is clearly supportive of the interpretation of the Supplemental Agreement advanced by the Corporation.

As noted above, the evidence before me discloses only one case in which the Corporation applied the Supplemental Agreement in a different way. It appears that in 1992, Montreal employee Colleen Hore, a records clerk, was given maintenance of earnings protection when she was displaced by reason of the return of a management employee to the ranks of the bargaining unit. The Union submits that that case constitutes persuasive past practice for the purposes of the instant grievance.

The Arbitrator cannot agree. While it might be that the precedent of Ms. Hore can be characterized as past practice, it is far from representing the whole picture. The uncontradicted material before me confirms that great numbers of displacements have occurred over a period of many years, by reason of persons occupying management ranks being returned to bargaining unit status. It appears that in no case, save that of Ms. Hore, has the Corporation applied the interpretation now being argued by the Union. What the evidence suggests, therefore, is that the overwhelmingly preponderant practice followed by the Corporation, apparently without any protest by the Union, is consistent with the practice utilized in respect of identical collective agreement language between the Union and CN,

as reflected in **CROA 2402**. While it is true that in **CROA 2023** the Arbitrator raised, without resolving, the issue which this grievance presents, the issue must be considered as conclusively resolved by the more thorough analysis in the subsequent case of **CROA 2402**, where the matter was squarely before the Arbitrator for determination. In the instant case, any ambiguity in the language of the Supplemental Agreement must be resolved on the basis of the predominant past practice, which clearly supports the interpretation of the Corporation.

For all of the foregoing reasons the grievance must be dismissed.

November 20, 1995

**(signed) MICHEL G. PICHER**
**ARBITRATOR**