CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2679

Heard in Montreal, Tuesday, 12 December 1995

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Interpretation and application of the contract dated June 14, 1995, issued by Justice Mackenzie.

UNION'S STATEMENT OF ISSUE:

On September 11, 12 and 13, 1995, the Union meet with representatives from Via Rail concerning the interpretation and application of the national contract issued by Justice Mackenzie in accordance with the back to work legislation ordered by the Canadian government.

During this meeting, the position of Bilingual Conductor on the Montreal assignments was discussed. The Corporation stated that this position would be filled by a bilingual conductor and in the event such position becomes vacant and there are no bilingual employees available to fill such vacancy, then a unilingual employee will be called and if a unilingual employee misses a call or refuses to accept the call, their guarantee and M.O.E. will be reduced accordingly.

The Union disagrees with the Corporation. The Corporation requested and was granted the position of conductor on the Montreal–Toronto assignments be filled by a bilingual employee. Because of this, senior employees are being denied their seniority rights to these assignments because they are not bilingual. Now the Corporation is insisting on monetarily penalizing a unilingual employee when called for these assignments if the employee misses a call or refuses to accept such call.

The Union's position is that a unilingual employee should not be penalized for not working a bilingual position.

The Corporation disagrees with the Union.

FOR THE UNION:

(SGD.) N. MATTHEWSON
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Corporation:

K. Taylor	– Senior Advisor and Negotiator, Labour Relations, Montreal
J. Ouellet	– Senior Labour Relations Officer, Montreal

And on behalf of the Union:

H. Caley	– Counsel, Toronto
M. P. Gregotski	– General Chairman, Fort Erie
G. F. Binsfeld	– Secretary/Treasurer, GCA, Fort Erie
R. Skilton	– Local Chairperson, Toronto

PRELIMINARY AWARD OF THE ARBITRATOR

The issue is dispute is whether the Corporation can reduce the guarantee or maintenance of earnings of a unilingual employee who refuses a call to a bilingual assignment. The Arbitrator is satisfied that, *prima facie*, the dispute concerns the interpretation of article 48 of the collective agreement and article D.14 and 15 of the Mackenzie award. For reasons elaborated in **CROA 2676**, it does not appear to be an issue of the incorporation of the Mackenzie award into the collective agreement. It concerns a dispute as to the meaning of the collective agreement.

For the reasons expressed in **CROA 2676** and subject to the reserve stated therein, the matter is found to be, *prima facie* , arbitrable. The General Secretary is therefore directed to list this matter for hearing on its merits.

December 15, 1995 **(signed) MICHEL G. PICHER**
ARBITRATOR

On Tuesday, 10 September 1996, there appeared on behalf of the Corporation:

L. Béchamp	– Counsel, Montreal
E. Houlihan	– Senior Officer, Labour Contracts, Montreal
F. Hebert	– Manager, Control Centre, Montreal

And on behalf of the Union:

H. Caley	– Counsel, Toronto
M. P. Gregotski	– General Chairman, Fort Erie
R. LeBel	– General Chairman, Quebec
G. Bird	– Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator discloses, beyond substantial controversy, that the Corporation has maintained a practice of calling running trades employees who are bilingual in priority order off the general spareboard list at Toronto, when it is necessary to fill bilingual positions. Unilingual employees are only called for such service when the complement of bilingual employees has been exhausted.

The Union bases this grievance, in part, on paragraph 9 of Addendum 12 of the collective agreement, agreed to between the parties on January 31, 1992. It provides as follows:

> **9.** Effective with the Spring Change of Timetable 1992, a separate spare board will be established at Toronto and employees on that spare board must be Bilingual. Employees on the Bilingual spare board will cover –
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> **(a)** tour of duty vacancies in Bilingual positions; and
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> **(b)** tour of duty vacancies in Brakemen positions between Toronto and Ottawa; and
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> **(c)** supplement the regular spare board when it is exhausted.

It does not appear disputed that the foregoing provision operated without the actual establishing of a separate spareboard, in the physical sense, by the Corporation. As long as trains were staffed by a two-person crew, the bilingual requirement could be met by the practice of calling the next available bilingual assistant conductor. It appears that difficulty now arises, however, because the service now operates on a conductor-only basis. In that regard Mr. Justice Mackenzie has provided the following addendum which provides, in part, as follows:

> The position of Conductor on trains with a conductor only operation between Montreal and Toronto must be filled by an employee who is qualified as bilingual. Upon the implementation of this settlement agreement, the Corporation will arrange to provide a language training program which will provide the required level of qualification to affected employees who demonstrate the attitude and aptitude to be trained.
>
> Employees in Toronto and Montreal who were awarded a conductor's position operating between Toronto and Montreal in the Fall 1994 change of time, will be protected and awarded a designated bilingual position even if they do not meet the bilingual requirements. Such employees will forfeit their protection when they

> bid for a non-designated position or if they do not successfully achieve the language requirement within three years of commencement, provided that with respect to any such employee hired prior to April 1, 1968, his protection will not be forfeited if he has made a best effort attempt to achieve the language requirement.

The Union now objects to the continuation of the practice which previously operated, without objection, with respect to the calling of bilingual employees at Toronto. It submits that the Corporation is under an obligation to segregate bilingual employees onto a separate spareboard, and that the previous practice of the Employer, namely calling bilingual employees who are so identified off the general spareboard to service bilingual positions is no longer acceptable. It submits that absent the establishing of a separate spareboard for bilingual employees, the Corporation cannot penalize unilingual employees who refuse an assignment on what would otherwise be a trip designated for bilingual service by the reduction of their guarantee or maintenance of earnings.

On a careful review of the material filed, the Arbitrator cannot sustain the position of the Union. In my view the Corporation has sufficiently complied with paragraph 9 of Addendum 12 of the collective agreement by the practice which it adopted, apparently at both Toronto and Montreal, with respect to the calling of bilingual employees off the general spareboard, as a first priority, for filling bilingual positions and resorting, thereafter, to unilingual employees. For a number of years, for reasons they must best appreciate, both parties acquiesced in the practice adopted by the Corporation for the purposes of satisfying the conditions of paragraph 9. In the Arbitrator's view, while a strict reading of the language of that paragraph would support the interpretation now advanced by the Union, namely that that the Corporation must establish a separate spareboard of bilingual employees, the Union must be seen as estopped from asserting that argument, at least for the term of the current collective agreement established by Mr. Justice Mackenzie. The Union knew, or reasonably should have known, the system which was in place for the purposes of the calling of bilingual employees, and unilingual employees when the complement of available bilingual employees was exhausted. It appears that it did not seek or obtain any amendment to paragraph 9 of Addendum 12 in the event of the Corporation's request for conductor-only operations being awarded by Mr. Justice Mackenzie. In the Arbitrator's view in that circumstance it cannot now seek to revert to a strict application of the provision which has been otherwise administered, without dispute, for a number of years.

It should be stressed that this award does not support the position advanced by the Union, insofar as it concerns the ability of the Corporation to deal with unilingual employees who decline a call to fill a bilingual position, in the absence of qualified bilingual employees. It does not, however, speak to the clear obligation which the Corporation now has under the Addendum established by Mr. Justice Mackenzie, namely that it must staff trains between Montreal and Toronto with a qualified bilingual employee, subject to the exceptions contained therein. It should further be noted that no argument was addressed to the Arbitrator as to whether the establishing of a separate bilingual spareboard would, of itself, offend against the provisions of the **Canadian Human Rights Code**, to the extent that it might, in its impact, segregate and limit the earnings potential of a particular group of employees, based on their national or ethnic origin.

For all of the foregoing reasons the grievance is dismissed.

October 29, 1996

(signed) MICHEL G. PICHER
ARBITRATOR