CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3388

Heard in Montreal, Wednesday, 10 December 2003

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Penalty claim – displaced from regular assignment on days off.

BROTHERHOOD'S STATEMENT OF ISSUE:

On May 21st, 2001, Locomotive Engineer Holden was displaced from his regular assignment while away on his days off.

Returning home on the morning of May 22nd, he received the telephone message and called the CMC and consequently chose a new assignment four hours later.

He was penalized 12 hours pay as a result.

Remedy sought: That he be made whole under 9(b) of the Mackenzie Award as he displaced within the 8 hour time and should not have been penalized.

FOR THE BROTHERHOOD:

(SGD.) J. R. TOFFLEMIRE
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Manager, Labour Relations, Montreal
G. Benn	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

J. R. Tofflemire	– General Chairman, Oakville
E. MacKinnon	– Local Chairman, Montreal
R. Theriault	– Local Chairman, Ottawa
R. Dyon	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

At issue in the instant grievance is the application of article 17 of the Mackenzie Award, now article 3.13 of collective agreement 1.4. That provision reads as follows:

> **3.13** Locomotive engineers who miss work opportunities for the following reasons:
>
> **(a)** Leave of absence because of sickness, injury or personal reasons;
>
> **(b)** Suspension as part of disciplinary actions;
>
> **(c)** Failing to exercise seniority within eight hours of a displacement,
>
> Will have their guarantees reduced by an amount equal to the hours earned by the locomotive engineer who replaced them.

The material before the Arbitrator reflects that the grievor, Locomotive Engineer P. Holden, held a regular assignment as of the change of timetable in April of 2001. He was then regularly assigned to run SW 36 between Toronto and Sarnia, Ontario under the provisions of article 211.1 of collective agreement 1.4. By reason of the return to work of a senior locomotive engineer and a chain of bumping, the grievor was displaced from his regular assignment at 20:04 on May 20. He was then at work on his assignment, and was not notified of the displacement either during his work to and from Sarnia or during his layover at Sarnia. Additionally, no advice of the displacement was given to him upon his return to Toronto, when he went off duty on May 21st. The evidence confirms that he then drove home to Brantford, Ontario, and thereafter proceeded to a family cottage. He returned from the cottage on the morning of May 22, 2001.

In the grievor's absence the Crew Management Centre (CMC) had left a message on his telephone at 18:03 on the 21st of May advising that the had been displaced. The position of the Corporation is that at that point he was governed by articles 214.3 and 214.3(a) of the collective agreement, and was required to displace within forty-eight hours to avoid a seniority penalty. Additionally, the Corporation maintains that he was then obligated to displace within eight hours to avoid any monetary penalty, by reason of the application of articles 3.9(b) and 3.13(c) of the collective agreement. Those provisions read as follows:

> **3.9 (b)** A locomotive engineer who is displaced will have his guarantee protected if he displaces within eight hours and fills the assignment on that first trip out.
>
> **3.13** Locomotive engineers who miss work opportunities for the following reasons:
>
> **(a)** Leave of absence because of sickness, injury or personal reasons;
>
> **(b)** Suspension as part of disciplinary actions;
>
> **(c)** Failing to exercise seniority within eight hours of a displacement,
>
> Will have their guarantees reduced by an amount equal to the hours earned by the locomotive engineer who replaced them.

The Corporation's representative concedes that the employer's interpretation of these provisions, and their application in the case of the grievor, is "draconian". He submits, however, that the alternative is to risk employees making themselves unavailable for notification of displacement, thereby encumbering the bumping process and possibly resulting in two employees being paid for the same tour of duty by virtue of the maintenance of the displaced employee's guarantee. In response, the

Brotherhood's representative submits that the application of the provisions as interpreted by the Corporation is clearly unfair, as Mr. Holden had no effective opportunity to protect himself and his earnings, to the extent that he was simply unaware of the displacement at the time it occurred.

While the Arbitrator appreciates the concerns which motivate the Corporation, I find it difficult to sustain it's interpretation of the provisions in question. As a matter of collective agreement interpretation, absent clear language to the contrary, it should not be presumed that either an employer or an employee should be made liable to a financial penalty or loss where the employer or employee does not have actual or constructive knowledge of the event which triggers that loss. To put it differently, neither the Corporation nor an employee covered by the collective agreement should, absent a clear contrary provision within the collective agreement, be presumed to be without any meaningful ability to avoid the possibility of a financial loss or penalty. In my view, it is unreasonable to believe that the parties would have intended that a locomotive engineer holding a regular assignment should be expected to check his or her telephone messages every few hours, twenty four hours a day, to see whether he or she has been displaced, so as to avoid the consequences of article 3.9(b) of the collective agreement.

When article 3.13 is read as a whole, the Arbitrator finds it difficult to conclude that the knowledge of the employee is not an essential condition to the tabulation of the eight hour period during which an employee is compelled to exercise his or her seniority. In my view the use of the word "failing" implies that the individual who fails to

act does so with the knowledge that he or she was displaced. The larger context of article 3.13 also tends to support that approach: sub-paragraph (a) deals with a loss of work opportunities by reason of sickness, injury or personal reasons causing an individual's absence, while sub-paragraph (b) deals with a loss of work opportunities as a result of a disciplinary suspension. In both of those circumstances there is clearly an element of knowledge operating as regards the employee concerned. In that context, I find it difficult to conclude that the parties would have intended that knowledge is irrelevant for the purposes of sub-paragraph (c), and that an employee who is displaced without being aware of it, as was the case with the grievor, is nevertheless to be penalized for "failing" to exercise his or her seniority within eight hours. In my view neither fairness nor common sense would suggest such a result.

Nor does the possibility of an employee deliberately avoiding notice of a displacement persuade the Arbitrator to a contrary result. Clearly, if it can be shown that an individual has acted abusively by deliberately making himself unavailable for communication from his or her employer, with a view to avoiding the consequences of the collective agreement, such abuse could not protect the individual from what would otherwise be the consequences of the normal operation of the collective agreement. More importantly, the mere possibility of attempts at abuse cannot, in my view, be the primary basis for the admittedly draconian interpretation of the provisions of article 3.13 of the collective agreement put forward by the Corporation.

Moreover, the Arbitrator is not persuaded by the Corporation's suggestion that it has consistently interpreted the collective agreement in the same manner as in this case. It is not disputed that a displacement among the ranks of assigned employees is a relatively rare occurrence, and there is simply no evidence before the Arbitrator to indicate that a similar incident may have occurred with any particular frequency since the Mackenzie award of 1995, much less that the Brotherhood was ever made aware in a timely manner of any such occurrence. This is not, therefore, a case of compelling past practice.

For all of the foregoing reasons the grievance is allowed. The Arbitrator directs that Locomotive Engineer Holden be compensated for the twelve hours of service deducted from his 160 hours guarantee.

December 15, 2003

(signed) MICHEL G. PICHER
ARBITRATOR