CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3715

Heard in Montreal, Thursday, 11 December 2008

Concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

A policy grievance in regards to the application of article 4.22(b) of collective agreement no. 2.

JOINT STATEMENT OF ISSUE:

It is the Union's position that the negotiated change to article 4.22(b) during the 2006-2007 round of collective bargaining applies on a system wide, national basis. Indeed, the only provision which was negotiated for trains 1 and 2 exclusively, were the newly negotiated provisions of Appendix 25.

The Union requests a ruling to the effect that the provisions of article 4.22(b) are meant to be applied systematically [sic] and that any employees adversely affected by the Employer's interpretation be compensated accordingly.

The Corporation submits that by amending article 4.22(b) in the previous round of collective bargaining the parties intended to address in good faith a situation affecting trains no. 1 and no. 2 only. The Corporation further submits that the evidence surrounding the collective bargaining confirms the interpretation and application of the article.

FOR THE UNION:	**FOR THE CORPORATION:**
(SGD.) D. OLSHEWSKI	**(SGD.) D. STROKA**
NATIONAL REPRESENTATIVE	**SR. ADVISOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

D. Stroka	– Sr. Advisor, Labour Relations, Montreal
B. A. Blair	– Sr. Advisor, Labour Relations, Montreal
S. Williams	– Director, Customer Experience, Halifax
M. Wolcke	– Director, Customer Experience, Winnipeg

J. Rondeau – Labour Relations Officer, Montreal
J. Lemyre – Sr. Manager, Customer Relations & Metrics

And on behalf of the Union:
D. Olshewski – National Representative, Winnipeg
D. Andru – Regional Representative, Toronto
J. Almdale – Regional Representative, Toronto

AWARD OF THE ARBITRATOR

At issue in this grievance is the interpretation and application of article 4.22(b) of the collective agreement. It reads as follows:

> Assigned employees arriving at an away-from-home terminal after the established reporting time for the return movement of their assignment, as shown on the Operation of Run Statement, having been en route for two (2) nights or more (i.e. between 2400 hours and 0700 hours) will not be required to return on their assignment unless there is a minimum period of eight (8) hours between arrival time inbound and actual train departure time for the return movement. If, under these circumstances, employees have been en route for one (1) night only (i.e. between 2400 hours and 0700 hours), they will be returned on their assignment provided there is a minimum period of two (2) hours and thirty (30) minutes between arrival time inbound and actual train departure time for the return movement.
>
> **If no qualified employees are available to protect the service, the employee required to return on their assignment, despite qualifying under this Article, will have the return portion of the trip paid at time and one-half rates.**
>
> [emphasis added]

It is common ground that the emphasized portion of the above provision was newly introduced into the article at the last round of bargaining. It was substituted for a sentence which had previously been there which read: “These provisions will only apply when other qualified employees are available to protect the service.”

It is also common ground that during the same round of bargaining the parties also added to the collective agreement the terms of Appendix 25, to deal with problems encountered principally at Toronto with respect to the crewing of Transcontinental Trains 1 and 2. That appendix reads, in part, as follows:

Appendix 25
Letter Concerning the Rest
at the Away From Home Terminal
for Crews Based in Western Canada

…

During our discussions it was agreed as follows:

1. Within 90 days following of the ratification of the Collective Agreement the Corporation will begin training Toronto Spare Board crews on Silver and Blue service with the exception of Chef and Cook. This training will be for the purpose of standby and/or crew augmentation; or, for replacement when crews on Trains I or 2 choose not to return on their assignment pursuant to Article 4.22 (b). The training will take place by classification in seniority order. If additional employees are required, they will be selected and trained in accordance with Article 16

2. On the Winnipeg to Toronto run, the time of Train No. 2 at Hornepayne will determine the following steps to provide rest for the crew:

3. If Train No. 2 is four but less than six hours late at Hornepayne:

a) Toronto Stand-by employees will be called to prepare the outgoing Train No. 1.

b) The Winnipeg Crew will report to Union Station rather than the Toronto Maintenance Center.

c) Crew reporting times will be given to the Service Manager who will advise the Hotel to call the crew for the adjusted reporting times.

4. If Train No. 2 is six or more hours late at Hornepayne:

a) Toronto Stand-by employees will be called to prepare the outgoing Train No. 1.

b) The Winnipeg Crew will report to Union Station rather than the Toronto Maintenance Center.

c) Crew reporting times will be given to the Service Manager who will advise the Hotel to call the crew for the adjusted reporting times.

d) A continental breakfast will be served by the Toronto Standbys.

5. If crews remain on-board following arrival in Toronto, Toronto standbys will be called to prepare the train.

6. Upon completion of their standby duties, unless needed to replace or augment Train #1, the Toronto standby shall keep their place on the Toronto spare board but will not be required to accept another trip on the same day.

7. The Corporation will endeavour to fly employees, including Chefs and Cooks, from Winnipeg to replace crews who choose not to return on their assignment pursuant to Article 4.22 (b) if sufficient qualified employees are not available at Toronto.

NOTE: Nothing in this letter shall be construed to prevent employees from choosing not to return on their assignment under the provisions of Article 4.22 (b).

The current dispute arises because the Corporation takes the position that the final sentence newly added to article 4.22(b) of the collective agreement was in fact intended to apply only in Western Canada, in relation to the operations of Trains 1 and 2, the transcontinental service. This grievance arises because the claim filed by the Union on behalf of fourteen crew members for the return portion of their trip on train no. 14 from Montreal to Halifax on March 10, 2008. Simply put, the employees in that circumstance maintain that they fit within the framework of article 4.22(b) as they were required to return on their assignment, notwithstanding that they qualified under the article. They therefore claim compensation at the overtime rates of time of one and one-half.

On behalf of the Corporation it is argued that there is a latent ambiguity in article 4.22(b) and that extrinsic evidence will both disclose that ambiguity and indicate that the parties intended the final sentence of the article to apply only to trains 1 and 2 operating between Toronto and Vancouver in transcontinental service.

Upon a review of the whole of the record the Arbitrator has some difficulty with that position. The parties before me are sophisticated in the ways of collective bargaining. As evidenced by Appendix 25, they know full well how to give particular treatment to particular problems. They must also be taken, however, to recognize that the collective agreement is national in scope, and that absent any express qualifying provisions, the general provisions of the collective agreement must be presumed to have application across the system.

When the bargaining notes adduced in evidence by the Corporation are reviewed, there can be little doubt but that the Corporation's intention and wish was to deal with the problem being encountered with the Western Canada transcontinental service, and that the introduction of a new final sentence into article 4.22(b) was seen by the Corporation as being responsive to that problem. But the record is devoid of any material which would establish, on the balance of probabilities, that both parties intended the sentence in question to be limited in its application solely to the operation of trains 1 and 2 in transcontinental service. Nor does the fact that the parties may have had a different understanding of the meaning and consequences of the amendment of article 4.22(b) mean that no obligation was incurred. In this circumstance what an Arbitrator must ask is what is the intention of the language of the provision. When the last sentence of article 4.22(b) of the collective agreement is examined, the Arbitrator can see nothing which would indicate ambiguity on the face of the language. At best, the extrinsic evidence adduced does little more than indicate that the Corporation's understanding may have been different from that of the Union during the course of bargaining, as regards the impact of the change being made to article 4.22(b).

It is trite to say that the Arbitrator must take the collective agreement as he finds it. It would, at a minimum, create a relatively absurd result to produce an interpretation of the article which would effectively mean that it has no application through what is arguably the great majority of the Corporation's operations in Canada, and that what appears to be an unqualified part of a broad and general provision is in fact language which applies to only two trains. Such an unusual and counterintuitive result might be possible, but it must surely be confirmed by clear and unequivocal evidence. No such evidence is presented in the instant case.

For all of these reasons the Arbitrator is satisfied that the interpretation of article 4.22(b) put forth by the Union, on the facts of the instant grievance, is correct. The grievance is therefore allowed and the Corporation is directed to compensate employees in the manner and at the rates claimed, being payment of the fourteen crew members of train no. 14 at the rate of time and one-half for their return portion of the trip, estimated by the Union to be twenty-five hours and forty-five minutes.

December 15, 2008

(signed) MICHEL G. PICHER
ARBITRATOR