CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4036

Heard in Montreal, Wednesday, September 14, 2011

Concerning

VIA RAIL CANADA INC.

And

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

EX PARTE

DISPUTE:

The method of reduction of Montreal collective agreement No. 1 employees at the CSE (Centre du service aux employés) as a consequence of the strike declared on July 24, 2009 by TCRC employees of VIA Rail Canada Inc.

UNION'S STATEMENT OF ISSUE:

The Teamsters Canada Rail Conference took strike action against VIA Rail commencing at 12:00 on July 24, 2009 and ending in the afternoon of July 26, 2009. The Corporation responded by temporarily abolishing the positions of most CAW members of all bargaining units on July 25 and 26, while retaining a number in service.

The Union contends that the Corporation violated the collective agreement as follows: **(1.)** The Corporation failed to provide notice to the affected employees, nor to their local chairperson, thereby violating article 13.2. **(2.)** The Corporation retained junior employees while senior qualified employees were laid off, thereby violating article 13.1. **(3.)** The Corporation did not allow senior displaced employees to exercise their seniority in accordance with the provisions of article 13.3 nor upon recall did it assign vacant positions as per the provisions of that same article. **(4.)** The Corporation altered established vacation dates of employees without local arrangement with the Union thereby violating article 9.20. **(5.)** The Corporation unilaterally altered terms and conditions of employment without consultation or agreement with the bargaining agent, thereby violating article 2.1. **(6.)** The Corporation misapplied the provisions of article 12.7 in filling positions.

By way of remedy the Union requests declarations to the above effect, full compensation for all employees who were not allowed to work as scheduled, compensation at penalty overtime rates for employees required to work outside their regular schedule and/or outside the provisions of the collective agreement, and that employees otherwise be made whole in all respects.

CORPORATION'S STATEMENT OF ISSUE:

The Corporation contends it effected the layoff of employees and retained required employees to provide for the order shutdown of operations in compliance with the collective agreement including clauses 2.1, 9.20, 12.7, 13.1, 13.2 and 13.3.

The Corporation further claims that the Union has been unwilling to supply the Corporation with a list of employees adversely affected.

FOR THE UNION:	**FOR THE CORPORATION:**
(SGD.) A. ROSNER	**(SGD.) B. A. BLAIR**
NATIONAL REPRESENTATIVE	**SR. OFFICER, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

B. A. Blair	– Sr. Officer, Labour Relations, Montreal
J. Gough	– Director, Customer Experience, Montreal

There appeared on behalf of the Union:

A. Rosner	– National Representative, Montreal
S. Auger	– Regional Representative, Montreal
D. Andru	– Regional Representative, Toronto
F. Sauvé	– President for grievances, Montreal
M. Laframboise	– Union Representative, Montreal
H. Grant	– Secretary/Treasurer, Halifax

AWARD OF THE ARBITRATOR

The instant grievance calls into issue the following provisions of the collective agreement relating to staff reductions:

> **13.2** In instances of staff reduction, 14 calendar days' advance notice will be given to regularly assigned employees whose positions are to be abolished, except in the event of a strike or work stoppage by employees in the railway industry, in which case a shorter notice may be given. The Local Chairperson will be supplied with a copy of any notice.
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> **13.3** An employee whose position is abolished or who is displaced from his permanent position shall:

> (a) displace a junior employee in his own seniority group on a permanent position, for whose position he is qualified.
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> or
>
> (b) displace a junior employee in his own seniority group on a temporary position, for whose position he is qualified if unable to hold a permanent position after exhausting seniority rights.

The facts relating to the dispute are not contested. The Corporation was subject to strike action by its locomotive engineers on July 24, 2009. That work stoppage continued until July 26, 2009, at which point operations returned to normal. As reflected in the joint statement of issue, the Corporation responded by abolishing almost all bargaining unit positions. That abolishment took place as a result of a general memorandum to all employees issued by the Corporation's President and Chief Executive Officer, Mr. Paul Côté, on July 24, 2009. That notice, which appears to have been posted in the workplace and also emailed to employees reads, in part, as follows:

> I regret to inform you that the Teamsters Canada Rail Conference union, which represents some 3340 locomotive engineers, has gone on strike. However, the federally appointed mediator asked to meet with both parties this morning; we are still meeting.
>
> Despite intense negotiations conducted this week and progress made on a number of important issues, the parties are unable to reach an agreement.
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> As a consequent of the strike, we have no choice but to immediately cease operations of Canada's national passenger rail service, except for those between Sudbury and White River and between Victoria and Courtenay, which are operated by a third part on VIA's behalf.
>
> Consequently, **all unionized employees**, except those otherwise advised by their supervisor, are laid off until further notice effective today at the end of their work shift. **Management employees** should continue to report to work as usual until further notice.
>
> (emphasis in the original)

The Union submits that the Corporation did not follow the notice requirements of the collective agreement. Its representative notes, without contradiction from the Corporation, that some employees, including the Union's local chairperson, did not themselves receive a copy of the communiqué of Mr. Côté of July 24, 2009. The Union stresses that certain employees were in fact retained to work and were not laid off. The evidence discloses, for example, that the two most senior available employees were kept to work at the Employee Service Centre in Montreal, and that none of the ten or so employees in the Stores Department at Montreal were in fact laid off.

The Corporation submits that the two senior employees selected to continue to work in the Employee Service Centre were properly selected in accordance with article 12.7 of the collective agreement which relates to temporary vacancies. That article provides as follows:

> 12.7 Temporary vacancies of 10 working days or less, and vacancies in other positions pending occupancy by the successful applicant may be filled without the necessity of advice notice or bulletin:
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> (a) first by a qualified part-time employee who has not completed 40 hours of work for any particular week;
>
> (b) then by a senior qualified regularly assigned employee at the same station or terminal who desires such work.
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> An employee filling a temporary vacancy pending occupancy by the successful applicant will not be subject to displacement during the first 30 days of occupancy. When it is known that a temporary vacancy will occur, employees desiring the position may be required, as locally arranged, to make their intentions known some time prior to the starting time of the vacancy. The employee, so assigned, will not be subject to displacement during such period, except by a senior qualified employee unable to hold work at the station or terminal affected.

There is no suggestion that the Corporation failed to generally notify the Union that a strike was imminent and layoffs would in all likelihood result. A letter dated July 21, 2009 was directed to the Union's Secretary/Treasurer, Ms. Heather Grant from the Corporation's Director of Labour Relations. That letter reads as follows:

RE: Possible Labour Disruption

> As you are aware we are in collective bargaining with Teamsters Canada Rail Conference. In the event of a labour disruption we do not intend to operate trains. We plan on implementing the following protocol to provide for the orderly shut-down of operations if a labour disruption occurs while respecting the terms of Collective Agreements #1 and #2 as much as possible in the circumstances.
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> – Agreement #2 employees would receive immediate lay-off notices unless required to perform their duties for a short period of time
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> – Agreement #1 employees may be required to perform their duties for a period of time including the storing and securing of equipment and supplies, assisting passengers, processing refunds and handling inquiries
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> – The employees retained will be selected by position and location in seniority order
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> – Those not required will receive lay-off notices
>
> – The employees retained for the shut-down period must report for work as required. The shifts will primarily be between 08:00 and 18:00 and at major locations.
>
> We are in the process of finalizing the contingency plan. Once the plan is completed we will provide you with further details and we will also share with you information received regarding a labour disruption.

It is also common ground that Ms. Grant subsequently communicated the gist of the information provided to her by the Corporation to all CAW members. Additionally, a meeting with regional union representatives was held on July 23 in Montreal to discuss the potential disruption and possible layoffs which might be occasioned by the strike and the Corporation's planned protocol of procedure in the event of a shutdown of operations.

The strike commenced at noon on July 24, 2009. On that day the letter of Mr. Côté, partially reproduced above, was communicated to the attention of all employees, albeit the evidence does not confirm that all employees received it. I accept the unchallenged representation of the Union's representative that Mr. François Sauvé, who apparently then had held the position of local chairperson at Montreal, did not receive a copy of the notice.

The Union's position is that in fact the Corporation did not honour the requirements of notice found within article 13 of the collective agreement. It does not dispute that the Corporation was entitled to give a short notice of layoff by reason of the fact that a strike was the cause of the layoff. It argues, however, that by simply issuing a generalized layoff notice, a copy of which was supposed to have been provided to Mr. Sauvé in his capacity as an employee and as a union representative, the Corporation did not provide the Union's local chairperson with the specificity that the article would require. Its representative submits that at a minimum the notice requirement should have been such as to allow Mr. Sauvé to identify which employees, within his territory, were in fact laid off and which employees, such as for example the employees in the Stores Department, were not laid off. And, lastly, he should know which employees were being designated, presumably on a seniority basis, to remain at work.

In the Union's submission the local chairperson was in fact entirely unable to advise employees who might wish to apply their seniority to displace a junior employee

still at work in accordance with the provisions of article 13.3 of the collective agreement, whether that employee was on a permanent or temporary assignment. The Union notes that in the normal course, when layoffs are implemented, the Corporation does make use of individual "Notice of Displacement" forms which give the specifics of any individual employee's layoff. Among other things, that form appears to allow the employee to make certain elections with respect to displacing into another position. That process was not followed on the occasion of the general layoff relating to the strike of July 24, 2009.

In support of its position the Union relies on a number of precedent cases of this Office. **CROA 517** involved a rotating strike which affected the Concord Terminal of the Canadian National Railway Company, requiring a short layoff of the employees. In that case article 13.2 of the collective agreement there in effect appears to have similarly required layoff notices be copied to the local chairman in a timely fashion, which was not done. Arbitrator Weatherill commented, in part, as follows:

> … In the instant case, the grievors were advised there would be no work for them on the following day. From the material before me, it appears that copies of such notices were not furnished to the Local Chairman in timely fashion.
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> In my view, the giving of a copy of such notice to the Local Chairman is a condition of the implementation of a staff reduction of this sort. Article 13 deals generally with the matter of staff reduction, displacement and recall, and in such cases it is certainly of importance to the Union to be in a position to advise employees of their rights, and to understand the whole situation. As has been noted in the decisions in the immediately preceding cases, senior employees are entitled to be retained, and there is no provision which would delay the exercise of their rights in that respect. Thus, on the basis of what was said in **CROA Case No. 515**, and also on the basis of the reasoning in **CROA Case No. 462**, I conclude that, in the circumstances of the instant case, the Company did not meet the requirements of Article 13. Its notice was not, in fact, in full compliance with Article 13.2, and, in any event, Article 13 does not prevent the immediate exercise of seniority rights.

Subsequently, in **CROA 540**, the same issue was revisited on the occasion of a railway strike which occasioned the giving of layoff notices to employees, where copies of those notices were not provided to the local chairperson as contemplated under article 13.2 of the collective agreement then in effect. In that case the arbitrator ultimately accepted the position of the union that the employees could not be considered as properly laid off and should be paid for their lost time. Arbitrator Weatherill reasoned, in part, as follows:

> In the cases of two of the three groups of employees covered by this grievance, the Transportation group and the Station Services group, this provision was not complied with. There appears to have been an attempt at compliance, in that copies of the notices were mailed, but they were not received in timely fashion, and it is my view that it is the Company's obligation, if it seeks to give effective notice pursuant to article 13.2, to ensure that copies of such notice are in fact received by the Local Chairman. As was said in **Case No. 517**, the giving of such notice is a condition of the implementation of a staff reduction of this sort.
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> It was argued that article 13.2 did not specify that notice must be timely. It is clear to me, however, for the reasons mentioned in **Case No. 517**, that the purpose of such notice is that the Union be aware of the situation and be able to advise employees. The copy to be provided to the Local Chairman is not merely for record purposes. In these circumstances, untimely notice is no notice. Such is, in my view, the clear effect of the article. It was also argued that the article did not specify any penalty for violation of its requirements. Again, it is not necessary that any penalty be specified. The requirement of notice, with copy to the Local Chairman is, as I have said, a condition of effective notice. Where that condition is not met, and no effective notice is given, then employees are not subject to loss of earnings through staff reduction. They are, therefore, entitled to compensation for losses flowing from the company's breach of the collective agreement.

It is significant, I think, that **CROA 540** concerned the application of the predecessor to the very provision which is here in dispute. While the employer was different, as the case predates the establishment of VIA Rail Canada Inc., there is nevertheless a fair application in these circumstances of the principle that where there is an arbitrated settlement of the meaning of a given provision of a collective agreement,

the parties must be taken to agree with the arbitrated interpretation in any case where they continue to renew the language in question within the framework of their collective agreement, without change. That appears to be what has occurred in the case at hand.

From a purposive standpoint, the Corporation's obligation to provide notice of individual layoffs in copy form to the local chairperson is clearly to allow the Union and its officers to respond to employee queries and facilitate the exercise of seniority by laid off employees who wish to displace into permanent or temporary positions for which they are qualified, by the exercise of their seniority. The Union's ability to exercise that right and administer that obligation was effectively frustrated by the manner in which the Corporation proceeded in the case at hand. In fact no individual notices of layoff were issued, but rather only the blanket communiqué of the Corporation's president which effectively advised employees that they would be laid off unless otherwise advised by their supervisor. That form of documentation plainly gave no meaningful knowledge to the local chairperson as to which employees continued to occupy positions in the workplace and the relative seniority of those employees as compared with employees who were in fact laid off.

I can see no reason to depart from the clear precedent of **CROA 540** in the circumstances of the case at hand. I am therefore compelled to declare that the Corporation did violate the requirements of article 13.2, and effectively frustrated the operation of article 13.3, contrary to the understanding and expectation of the parties as reflected in the express terms of their collective agreement. I further direct that all

employees adversely affected by the Corporation's actions be compensated so as to be made whole on the understanding, as reflected in **CROA 540**, that they were not in fact properly laid off, and that any unilateral changes in vacation time made contrary to article 9.20 of the collective agreement be adjusted if necessary.

September 22, 2011 **(signed) MICHEL G. PICHER**

ARBITRATOR