CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4044

Heard in Montreal, Tuesday, 8 October 2011

Concerning

VIA RAIL CANADA INC.

And

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

DISPUTE:

On December 17, 2010, the Corporation advised the Union that 3 positions in South Western Ontario would not be replaced due to attrition. The Union maintains that the attrition was inappropriate.

JOINT STATEMENT OF ISSUE:

The Union contends that the Corporation violated article 12.1 by posting 3 positions as temporary under article 12.6. The Corporation then abolished these jobs through attrition.

The Union contends that the Corporation should have immediately abolished the positions upon retirement or reposted them as permanent positions under article 12.1. The Union also contends that the Corporation abolished 3 positions by attrition yet only two employees actually retired, violating article 8.1 of the Supplemental Agreement.

The Union seeks notices under article 8.1 of the Supplemental Agreement for the above positions and reimbursement of all affected employees for any lost wages and benefits as a result.

The Corporation maintains that there were no adverse effects on employees and there was no violation of the collective agreement. The Corporation submits that the abolishment of these positions by attrition was proper.

FOR THE UNION:
(SGD.) R. FITZGERALD
PRESIDENT

FOR THE COMPANY:
(SGD.) B.A. BLAIR
SR. OFFICER, LABOUR RELATIONS

There appeared on behalf of the Corporation:

B. A. Blair	– Sr. Advisor, Labour Relations, Montreal
J. Mailhot	– Advisor, Labour Relations, Montreal
K. Murphy	– Manager, Customer Experience SWO, Toronto
T. Kahnert	– Manager, Customer Experience, Toronto

There appeared on behalf of the Union:

D. Andru	– Regional Representative, Toronto
R. Fitzgerald	– National Representative, Toronto

AWARD OF THE ARBITRATOR

The Union alleges that the Corporation violated articles 12 and 8 of the collective agreement, as reflected in the Joint Statement of Issue. The grievance is triggered by a notice provided to the Union by the Corporation, initially by letter dated December 17, 2010. In that letter the Union's National Representative was advised by the Corporation's Senior Advisor, Labour Relations that three Counter Sales Agent positions in Southwestern Ontario were being abolished as a result of the attrition realized from the retirement of two employees, and the third position being effectively vacant.

The first position in question was occupied by employee Douglas Marks at Chatham and designated as "Senior Counter Sales Agent". The material before the Arbitrator confirms that following Mr. Marks' retirement his position was posted on a temporary basis pursuant to article 12.6 of the collective agreement, and was filled by M. D. Greenwood on May 25, 2010. The position then held temporarily by Ms. Greenwood was posted as a permanent vacancy in accordance with an overlapping bulletin of May 19, 2010 and was awarded to Ms. Greenwood on June 16, 2010, as she was the senior qualified applicant.

The position at Chatham previously held by Ms. Greenwood was posted as a temporary vacancy and awarded to employee C. Whybra. Following the same pattern, Ms. Greenwood's former position was then posted on a permanent basis regionally. However that posting was cancelled as the Corporation determined to make certain changes is hours of work at a number of Southwestern Ontario stations. Accordingly, the position was subsequently posted under article 12.4 of the collective agreement, only to the seniority group at the station, and was awarded to Mr. Whybra on a permanent position basis. Ultimately, Mr. Whybra's permanent vacancy was awarded on a temporary basis to Ms. L. Horner, until it was effectively abolished and recreated as a part-time assignment, which was then awarded to Ms. Horner on December 29, 2010. In the result, Chatham went from having three full time positions to two full time positions and one part time assignment.

The position of the Union is to some extent understandable as regards the treatment of Mr. Marks' position. The notice initially provided to it on December 17, 2010 indicated that Mr. Marks' position was being abolished. In fact, that is not the case. What happened in substance is that the Corporation reviewed the workload at Chatham, implemented some changes in the hours of work and ultimately did eliminate one full time position at the lower end of the ripple effect, but not the position of Mr. Marks. The gist of the Union's complaint with respect to the Chatham position stems from its belief that the Corporation was simply indefinitely continuing Mr. Marks' position by filling it on the basis of temporary vacancies. As confirmed above, however, that

claim cannot be sustained. The material before me confirms that Mr. Marks' position was ultimately awarded on a permanent basis to Ms. Greenwood. I am satisfied that the earlier temporary assignment of Ms. Greenwood to that position was not inappropriate, to the extent that the Corporation was revisiting its manpower and work scheduling needs. Nor can I find that there was any violation of article 8 in respect of the treatment of employees at Chatham, as there were in fact no employees adversely affected by the Corporation's actions, principally because of the attrition occasioned by Mr. Marks' retirement.

As reflected in **SHP 345**, attrition can be a mitigating factor with respect to job abolishments to the point of effectively nullifying adverse impacts:

> … the Company is entitled to take attrition into account in its complement of employees in determining whether an operational or organizational change can be said to have an adverse impact on employees. If a group of 100 employees is affected by the abolition of ten positions, while at the same time ten employees quit, retire or are discharged for cause, it can be said that the operational change has impacted the work force in that it has reduced the complement of employees from 100 to 90. To the extent, however, that no employees are laid off, it cannot be asserted that there has been an adverse effect on employees caused by the operational change. … it must be found no such notice [under article 8.1 of the ESIMA] is required where the job abolishments are offset by contemporaneous attrition … Where it is established that attrition has cushioned the blow of any particular job abolishments, to the extent that any particular job abolishment can be matched with an identifiable incidence of employee attrition, article 8 [notice] has no application.

The second position included in the notice of December 17, 2010 concerned the abolishment of the position held by Counter Sales Agent Rose Buck at Woodstock, on the occasion of her retirement. Ms. Buck took the position of Senior/CSA in Woodstock by an award under a regional bulletin on July 28, 2010. On October 31, 2010 she opted to retire from that position in Woodstock. The position was then bulletined as a

temporary vacancy and awarded to Mr. S. Macneil on October 5, 2010. Following a notice of changed hours of work, shifts and rest days issued on December 22, 2010, the position held by Mr. Macneil on a temporary basis was awarded to employee Eileen Spratt on December 29, 2010. It was determined that Mr. Macneil, although senior to Ms. Spratt, was not eligible to bid on the permanent position at Woodstock as the change was implemented under article 12.4 of the collective agreement, which limits applications to employees at the station. Ultimately, therefore, the permanent Senior CSA position at Woodstock was awarded to Ms. Spratt effective January 5, 2011. In the result, the staffing at Woodstock went from two full time and one part time positions to one full time position and two part time positions.

Upon reviewing this sequence of events, the Arbitrator cannot agree with the statement of the Corporation that “the permanent position at Woodstock held by Ms. Buck was not replaced due to attrition as of the date of her retirement.” In fact, her position was not abolished, although attrition did have an impact at the lower end of the ripple effect, as apparently occurred in Chatham. To that extent, therefore, the Arbitrator must again find that the notice given to the Union on December 17, 2010 was not correct, as the position there held by Ms. Buck was not abolished. As with the situation in Chatham, however, no violation of article 8 of the collective agreement is disclosed as there was plainly no adverse effect to any employees, by reason of the attrition which did occur.

The third situation presented concerns a vacancy in Kitchener. It appears that the position of Counter Sales Agent at Kitchener had been held by Ms. Buck who bid off it effective July 28, 2010. While it was temporarily assigned to the senior employee, Mr. André Arseneau, after the exhaustion of the temporary assignment the Corporation opted not to replace the vacant position. In the result the Kitchener Station was reduced from three full time positions to two full time positions by the decision to essentially cancel the vacancy.

With respect to the events at Kitchener, the Arbitrator can see no violation of the collective agreement. It is plainly within the prerogatives of an employer to abolish a position which is vacant. To the extent that it does so without any adverse effect to employees, as is the case here, there can be no violation of article 8 or of any other provision of the collective agreement of which I am aware.

In the result, the grievance can only be allowed in part. The Arbitrator is compelled to find and declare that the Union is correct in asserting that the notice of December 17, 2010 is incorrect, in that two of the three positions identified in that notice were not in fact abolished. However given the operation of attrition in two of the three circumstances, I cannot find that there was any violation of either article 12 or of article 8 of the collective agreement. Specifically, I am satisfied that the Corporation’s uncertainty and intention to make adjustments to manpower and scheduling requirements in Southwestern Ontario did justify recourse to the posting of temporary

positions pursuant to article 12.6 of the collective agreement, until such time as it was confirmed that positions would be made permanent, as occurred in two instances.

I cannot agree that the Corporation was under an obligation to immediately post the positions of the retirees under the provisions of article 12.1 of the collective agreement, posting those positions on a regional basis when in fact the Corporation was planning changes which would properly bring into effect the operation of article 12.4 of the collective agreement by reason of changes in manpower and work schedules at these locations. In the circumstances, as no employees have been adversely affected and these are not circumstances which would justify the application of article 8 of the collective agreement, I deem it appropriate to limit the remedy to the declarations contained herein.

October 17, 2011

(signed) MICHEL G. PICHER
ARBITRATOR