CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4409

Heard in Montreal, June 10, 2015

Concerning

VIA RAIL CANADA INC.

And

UNIFOR

DISPUTE:

Company: The changes made to the Corporation's Rail Pass Program.

Union: Corporation's unilateral changes to the Rail Pass Program thereby violating Articles 2.1, 27.15 and 17.2 of agreements No.1 and No.2 as well as in violating the *Canada Labour Code.*

COMPANY'S EXPARTE STATEMENT OF ISSUE:

It is the Corporation's position that the issuing of rail passes is a privilege covered by a corporate policy. The policy clearly indicates that the privilege is subject to change without notice.

The terms of the rail pass policy are described in the benefit plan which states the purpose is to provide a general overview of the benefits enjoyed by VIA rail employees. The document clearly indicates that it does not form an integral part of the collective agreement.

The Corporation maintains that the Rail pass policy is not negotiated and the Corporation may change the terms of the policy without notice, as per the terms of its policy.

UNION'S EXPARTE STATEMENT OF ISSUE:

It is the Union's position that the issue of rail passes is a negotiated matter between the parties and referenced in the Collective agreement. Therefore, the Corporation is prohibited from making unilateral changes in isolation of the Union. In addition the Union contends the Corporation's pass policy effect at the signing of the Memorandum of Agreement dated June 26, 2013 cannot be altered to the detriment of its members. In the alternative the Union submits that the Corporation is estopped from making the changes during the life of this collective agreement.

The Union maintains that the rights and privileges of the collective agreement related to the rail pass remain untouched during the life of the collective agreement and any and all affected employees be totally compensated accordingly.

The Corporation declined the Union's grievance.

FOR THE UNION:
(SGD.)R. J. Fitzgerald
National Representative

FOR THE COMPANY:
(SGD.) B. A. Blair
Senior Advisor, Employee Relations

There appeared on behalf of the Company:

W. Hlibchuk	– Counsel, Montreal
B. A. Blair	– Senior Advisor Employee Relations, Montreal
G. Sarazin	– Senior Advisor Employee Relations, Montreal
D. Trubiano	– Senior Manager Operations Control, Montreal

There appeared on behalf of the Union:

A. Rosner	– National Staff, Montreal
R. Fitzgerald	– National Staff, Montreal
H. Grant	– Secretary Treasurer National, Halifax
D. Andru	– Regional Representative, Toronto
S. Auger	– Regional Representative, Montreal
S. Bruneau	– Observer, Montreal

There appeared on behalf of the Intervener:

R. Hackl	– Vice President, Saskatoon
B. Willows	– General Chairman, Edmonton
B. Ermet	– Senior Vice General Chairman, Edmonton

AWARD OF THE ARBITRATOR

1. The TCRC has intervened in these proceedings because they have an interest in its outcome.

2. The Union's policy grievance is filed on behalf of employees covered by collective agreements #1 and #2 (off-train employees, and on-board services employees).

3. The Company has a preliminary objection to the grievance. It submits that the changes complained of by the Union were made to a Corporate policy, which is not grievable. It argues that it has the management right to unilaterally alter its policies without prior consultation with the Union.

4. The provision that deals with rail passes in Agreement #1, which is the same in Article 28.10 of Agreement #2, reads:

> 27.15 Employees will be provided with free transportation privileges in accordance with the Corporation's policy. Employees on laid-off status and eligible dependants will be granted pass privileges in accordance with the Corporation's regulations, for the period that they remain employees of the Corporation.

5. The first sentence of this provision came into the parties' 1987-88 collective agreement and has been there since. The second sentence first appeared in the 1995-97 agreement, imposed as a result of an interest arbitration award determining that collective agreement. I see no distinction between "the Corporation's policy" and "the Corporation's regulations". The terms will be used interchangeably.

6. Prior the 1987-88 collective agreement, since 1979, the Corporation had a practice of providing free transportation privileges to its employees and to pensioners who were former employees of the Corporation.

7. The Corporation has from time to time amended its policy and regulations. Free transportation was at first done in accordance with Sections 300 and 301 of the *Railway Act* (repealed in 1986) and General Orders T-26 and T-27 of the National Transportation Agency. In 1985 the Corporation issued a comprehensive policy, describing the free transportation privileges. There were then three classes of free transportation privileges, "A", "B" and "C" levels. "A" level applied to the senior executives of the Corporation. "B" level privileges were for those employees with more than five years' pensionable service and their spouses and dependents, and senior management employees, their spouses and dependents. "C" level privileges were for employees who had completed one year of service, but less than five years, and their spouses and dependents. While both B and C

levels had free transportation privileges, certain restrictions applied to C level employees that did not apply to the A and B levels.

8. The Corporation introduced amendments to the policy in 1991, 1992, 1995, 2002 and in 2007 and possibly at other times for which records do not now exist. In 2007 the levels of privileges were removed. Instead, eligibility was set at one year of continuous service for all employees. In 2006, under the Corporation's Pension administration guide, the Company relaxed the pensionable service level to two years. In each of the policy amendments, the substantive entitlements were maintained, subject to certain adjustments in the application of the rules of use.

9. The Corporation's booklet to employees of the transportation policy explained that the booklet did not form part of the collective agreement, but was issued to provide an overview of the benefits of the free transportation privileges, and that it was subject to change by the Corporation without notice. The Company makes the point that the employee entitlements are privileges, not conventional rights under the collective agreement. Privileges can be amended from time to time depending on the Corporation's exigent operational needs.

10. The regulations concern such issues as eligibility criteria and levels and extent of privileges, restrictions on reservations, fare classes, peak travel periods, not running trains only for passholders, and penalties for abuse or fraud. Until the circumstances giving rise to the grievance, these alterations did not impact materially on the substantive privileges of free transportation for employees and pensioners, their spouses and

dependents.

11. At various times proposals were made by the Union to extend the language of Article 27.15 (and 28.10 of Agreement #2), but no agreement was reached and the proposals were dropped. Among them was a proposal to delete reference to the Company's policy and regulations, and a proposal to add guests or friends of the main rail pass holder (employee, laid-off employee or pensioner). The retention of the reference to the Corporation's policy and regulations was important to the Corporation and the removal was not conceded. I adopt the approach of Arbitrator Picher in **SHP671** that no adverse inference can be drawn from the fact that a party made a proposal it did not pursue in bargaining.

12. During the period May to July 2014 the Corporation's new President / Chief Executive Officer, Yves Desjardins-Siciliano, conducted what was described as an Employee Tour. He met with individual employees, and groups of employees, to hear their views on issues of interest to them. There was no specific consultation with the Union on any changes to free transportation privileges, though the matter was discussed with employees during the tour.

13. During September 2014 the Corporation gave notice of substantive changes to the free transportation privileges. The Corporation made the changes under its discretion to determine its policy and regulations for the administration of the transportation privileges. There were iterations of the changes. The final version, effective from March 26, 2015, has material changes to the free transportation privileges. Some are better for employees,

such as employees' guests being entitled to travel with the employee at 50% fare. The Union does not complain of the improvements. But certain of the changes are worse for employees' family members. These concern the Union. In particular: spouse/common-law partner and dependents of permanent employees and eligible retirees will no longer have free transportation privileges. They will pay 50% of any available fare, unless they travel "last minute", with the reservation made after 12:01 a.m., Pacific Time, the day prior to the travel date. The new program will in future exclude those pensioners who have not reached age 55 and participated in the pension plan for at least 10 years. This will likely affect those on disability pension, among other retirees.

14. The Company argues that the free transportation privileges are subject to the Corporation's policy. The Company's strict reservation of the discretion to make changes to the program and to set conditions and restrictions on rail passes means that the Corporation had no obligation to consult or negotiate with the Union and it can make the changes it has now made.

15. The Employer's preliminary objection, and its argument on the merits of the grievance, is that the Corporation can unilaterally amend its policies, including its free pass policy and regulations. I find that it may do so, however, only within the bounds of the collective agreement provision which establishes the entitlement of the Union and its members to those privileges. It can unilaterally amend its policy and regulations, but only to the extent those amendments do not infringe upon the established privileges of employees to free transportation under the collective agreements. The extent to which the Corporation infringes upon those rights is grievable. That is the subject of the

grievance, which I have jurisdiction to determine. The Corporation's preliminary objection is therefore denied.

16. The Union submits that Article 27.15's reference to the Company's policy and regulations is to the policy that applied at the time the collective agreement provision was agreed upon, and so the policy and regulations remain fixed in time at the date the agreement was concluded.

17. The reference to the employees' free transportation privileges "in accordance with the Corporation's policy" in Article 27.15 can mean one of three things: the policy was fixed at the time the provision was agreed upon in about 1987; or the policy was fixed at the effective date of each fresh collective agreement; or the policy is not fixed and it changes from time to time, in the Corporation's discretion. There are two reasons to find that the last of these possibilities is what the parties intended. Firstly, the policy has changed from time to time and those changes have occurred unrelated to the start dates of the respective collective agreements, without objection from the Union. Secondly, the Corporation expressly included reference in the policy to its entitlement to change the policy at its discretion, presumably at any time.

18. The entitlement is not to "free transportation" for employees, but to "free transportation privileges". From the parties' long application of the provision, the addition of the word, "privileges" has two purposes. The first is that free transportation is not an independent right, but an entitlement that is encompassed by, and described in, the Corporation's policy. The second purpose is that it refers not only to the employee, but to

the employee's spouse and dependents. That has been the nature of the employee's free transportation privilege from the 1970s and onwards into the collective agreement when the provision was introduced in 1987.

19. The necessary inclusion of spouses and dependents in the notion of "free transportation privileges" is affirmed by inclusion of the second sentence of Article 27.15. The second sentence, introduced by interest arbitration nearly a decade after the first sentence, includes express reference to "eligible dependents". That is because eligible dependents (spouses and dependents) were always part of the persons who were to be included as part of the benefit in the first sentence – they were the persons intended by the parties to be covered by "free transportation privileges". The interest arbitrator required explicitly, with respect to laid-off employees, what was always implicitly the entitlement for actual employees. Further, the provision as a whole would be absurd if laid-off employees' eligible dependents were entitled to free transportation, but actual employees, not laid-off, did not have the same entitlement. Clearly, what applies to laid-off employees has always been the entitlement of employees referred to in the first sentence of the provision.

20. Although differently expressed, the second sentence of Article 27.15 does not detract from the first sentence. Although different language is used, the purpose of the second sentence is merely to ensure that laid-off employees, while still employees of the Corporation, have no lesser entitlement than regular employees.

21. The key question for the interpretation of Article 27.15 is to determine what is

meant by the phrase, “free transportation privileges in accordance with the Corporation’s policy”. It cannot mean, as the Company argues, that the Corporation can do anything it likes. That is because the Employer cannot effectively eliminate the benefit for a person entitled to the “free transportation privileges”. That interpretation would give meaning to the phrase, “in accordance with the Corporation’s policy”, but it would give no meaning to the phrase, “employees will be provided with free transportation privileges”. Meaning must be given to both phrases and they must be read together.

22. I understand the combination of the two phrases to mean that the Corporation can do what it wishes in the policy, subject to maintaining free transportation privileges for employees. The Corporation can make what changes it wants, provided it does not effectively or practically remove the value of the benefit contained in the notion of employees’ “free transportation privileges”.

23. The collective agreement provision is properly understood as a composite of substantive free transportation privileges for employees (including laid-off employees), their spouses and dependents, in the context of the Corporation’s ongoing, and changing, policies and regulations regarding the exercise of those privileges. What is meant by the reference to the Company’s policy and regulations in the collective agreement provisions is the following. Provided the substantive entitlements of free transportation privileges are maintained, and there is no material erosion of them, how those privileges are restricted, applied and administered is determined by the Company’s policy and regulations, and those may change from time to time.

24. Subject to the particular rules and regulations of application and administration under the Corporation's policy from time to time, throughout the period from 1979 until the circumstances giving rise to the grievance, in other words for a period of over 35 years (with laid-off employees added in 1995), the following free transportation privileges applied:

- Employees and members of their immediate family had free transportation privileges;
- Laid-off employees, while still employees of the Corporation, and members of their immediate families had free transportation privileges.

25. These were the substantive privileges mutually contemplated by the collective agreement. Also these were the substantive privileges the parties knowingly applied "over a substantial number of years, spanning the renegotiation and renewal" of the collective agreements "in unchanged terms". In these circumstances, "as is well established in the prior decisions of this Office", "the parties are taken to accept the established interpretation as part of their agreement". These quotes are taken from **CROA&DR 1930**.

26. The changes the Company has introduced represent significant, material changes to those privileges. The Corporation has gone beyond a mere adjustment of its application and administration of the employees' free transportation privileges. Employees, who have long had free transportation privileges for themselves and their families, have recently had the privileges for their immediate family members substantially reduced. The changes by the Employer therefore represent a material breach of the collective agreements.

27. The Union argues, in the alternative, that an estoppel applies to maintain the free

transportation privileges that existed before the unilateral changes made by the Employer in 2014 and 2015. The Union argues this particularly in the context that, over the last four rounds of bargaining for renewal of the collective agreements, with one explained exception, the parties have diligently given clear written advanced notice to each other of any intention to cease an existing practice or interpretation that might, in the absence of such notice, give rise to an argument of estoppel.

28. I have found that, with respect to employees and laid-off employees, the Corporation has breached the provisions of Article 27.15 of the collective agreement. Although the long practice has been to apply the employee free transportation privileges to retirees, there is no mention of retirees or pensioners in the Article. The recent changes to the privileges that specifically affect them cannot, therefore, be a violation of Article 27.15. The Union's argument of an estoppel is accordingly relevant to the retirees.

29. Estoppel is an equitable doctrine, designed to remedy an unfairness in the strict application of contract language. The necessary elements for an estoppel are: a clear and unequivocal representation by words or conduct by the Corporation to do or not do something, intended to be relied on by the Union; reliance by the Union on that representation; and detriment resulting from that reliance.

30. The evidence establishes that the Corporation represented that retirees – persons who were employees of the Corporation and took retirement on pension – would be entitled to the same free transportation privileges as employees. That representation was made for the whole period that the free transportation privileges have existed, over thirty-

five years.

31. Although the Company conveyed in its policy document that it could change the policy at any time within its own discretion, by its long, consistent conduct it also conveyed to the Union that it did not intent to remove the substantive free transportation privileges from pensioners. The Union reasonably relied on this representation. It did so to its detriment, in that, had it known of the Employer's intention to alter the retirement eligibility for free transportation privileges and of the impact of the changes on spouses and dependents of retirees, the Union could have bargained the issue. Because the changes the Employer has made have occurred within the term of the current collective agreements, the Union has been deprived of that opportunity. The free transportation privileges are a material benefit for pensioners. Those deprived of the benefit as a result of the change in the Employer's policy suffer a loss.

32. In the circumstances the Union has established the necessary elements of an estoppel for pensioners, their spouses and dependents who, but for the recent changes to the policy made by the Corporation, would be entitled to free transportation privileges. The Corporation should be estopped from applying those changes.

33. The second claim in the grievance is that the Employer has acted unilaterally, in violation of the Union's status in the collective agreements as the exclusive bargaining representative of the employees it represents, under Article 2.1 of the collective agreements. The provision in Agreement #1 reads:

> 2.1 The Corporation recognizes the National Automobile, Aerospace, Transportation and General Workers Union of Canada as the sole bargaining agent with respect to wages, hours of work and other working conditions for all classes of employees recognized by the Canada Labour Relations Board certification order dated January 25, 1985, as well as equipment maintenance employees in the classifications represented by the Union.

The provision in Agreement #2 reads:

> 2.1 The Corporation recognizes the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW/TCA Canada) as the sole collective bargaining agent with respect to wages, hours of work and other working conditions for train service employees of On-Board Services, including corporate employees engaged in the preparation of food and beverages for service on trains, VIA Rail Canada Inc., in classifications listed in the wage scale set forth herein.

34. As the Union argues, the Union has exclusive bargaining rights on behalf of the bargaining units it represents. Negotiation on changes to collective rights and privileges of employees must be undertaken by the Employer with the Union, and not directly with the employees. Direct negotiations undermines the capacity of the Union to represent the employees appropriately.

35. The Corporation's Employee Tour involved consulting employees, but there were no negotiations, nor any agreements concluded, directly with employees. There was thus no undermining of the Union's status as the bargaining agent of the employees. There was therefore no violation of Article 1.2 of the collective agreements.

36. In the circumstances, I find, with respect to employees represented by the Union, the Corporation has breached the provisions of Article 27.15 (and Article 28.10) of the

collective agreement by materially altering the free transportation privileges that existed until 2014. As explained, with respect to pensioners, I find that the Corporation is estopped from making the changes to pensioner eligibility and the free transportation privileges of retirees' spouses and dependents for the duration of the collective agreement.

37. The grievance is therefore upheld. The Corporation is directed to restore the free transportation privileges that existed prior to the substantive unilateral changes effected in 2014 and 2015.

38. I remain seized of the application and implementation of this award.

August 4, 2015

CHRISTOPHER ALBERTYN
ARBITRATOR