CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4464

Heard in Edmonton, May 9, 2016

Concerning

VIA RAIL CANADA INC.

And

UNIFOR

DISPUTE:

Unjustly held Samuel Theriault out of service for the duration of the March 18, 2015 trip (trains 15-14).

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Laid-off Via Agreement #2 employee Samuel Theriault had accepted a call from the laid-off list to work train 15 on March 18, 2015. Despite his best efforts the grievor was unable to make it through the severe snow storm in the province. Therefore, he was unable to report to the train and it left without him. As a result, the Corporation held him out of service under the provisions of Article 7.7(c) which caused him to miss other opportunities to work.

It is the Unions contention that Article 7.7(c) is not applicable in this case because the grievor was not a spare-board employee but rather a laid off employee. Therefore, article 13.13 would be the applicable article.

The Union is seeking a declaration that Article 13 is the appropriate Article to deal with layoff and recall and that the grievor be compensated for all wages and benefits.

The Corporation disagrees with the Union position.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Theriault, a Halifax on-board employee, refused duty for the trip departing Halifax on Wednesday, March 18, 2015. He had initially accepted duty to work this trip.

Article 7.7c of the collective agreement states:

> If employees refuse a call, their names will remain off the spare-board, until the earliest time the employees who were assigned to the run would return, at which time their names will be placed a the bottom of the spare-board in the order they would have arrived.

Consequently, the Corporation applied the collective agreement and held him out of service for the duration of the trip.

It is the Corporation's position that it correctly applied the collective agreement and that no compensation is owed to Mr. Theriault.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. J. Fitzgerald	**(SGD.) B. A. Blair**
National Representative	**Senior Advisor, Employee Relations**

There appeared on behalf of the Company:

B. A. Blair	– Senior Advisor, Employee Relations, Montreal
S. Duffy	– Senior Manager Customer Experience, Halifax

There appeared on behalf of the Union:

D. Andru	– Secretary Treasurer, Toronto
R. Fitzgerald	– National Staff Representative, Toronto
J. Murray	– Regional Representative, Moncton
B. Kennedy	– President, Council 4000, Edmonton

AWARD OF THE ARBITRATOR

The parties are agreed that Via Rail Inc. (the "Company") called Mr. Samuel Theriault (the "grievor"), a laid off employee, on Tuesday March 15, 2015. The Company offered him duty on board train 15 departing from Halifax the next day. The Company did so pursuant to article 7.8 of the collective agreement which governs the treatment of employees on the spare board and further provides that when spare board employees are not available to fill a position: "positions may be filled by qualified laid-off employees in seniority order."

The parties are agreed that the grievor was under no obligation to accept the call to fill the spare board position, yet he did accept the call and was placed on the active crew roster for the train departing March 18, 2015. The grievor booked off work on

March 18, 2015 because of the challenges he faced getting to work due to a snowstorm.

The Company considered the grievor's failure to attend at work to be a call "refused" as it did for all other regularly assigned employees who had booked off on March 18, 2015 because of the storm. The Company applied the consequences mandated by article 7.7(c) for refusing a call to all employees who booked off because of the snow storm. On an exceptional basis, however, the Company offered employees the option of taking vacation days to replace their lost wages. The grievor declined that offer.

The Company says it properly applied article 7.7(c) in the circumstances and that the grievance should be dismissed. The Union disagrees.

Article 7.7 reads:

> **ARTICLE 7**
> **SPARE BOARD**
> ….
>
> 7.7(a) Hours of call shall be established in accordance with service requirements. The names of employees will not be dropped to the bottom of the spare board if they are not available for a call outside the call hours locally agreed upon.
>
> (b) If employees cannot be contacted during call hours, their names will be placed at the bottom of the spare board as at midnight that day.
>
> (c) If employees refuse a call, their names will remain off the spare board, until the earliest time the employees who were assigned to the run would return, at which time their names will be placed at the bottom of the spare board in the order they would have arrived.

> (d) If employees refuse a call or cannot be contacted during call hours for standby or terminal duty only, their names will be placed at the bottom of the spare board as at midnight that day.

The Company submits that the only exception to the proper imposition of the consequence for the griever's refusal of duty established by article 7.7(c) of the collective agreement is specified in article 7.7 (d). That article does not apply to the circumstances here. The Company therefore asserts that the terms of the collective agreement as they apply to spare employees (defined as an employee who does not hold an assignment by bulletin) who refuse duty is properly applied to all employees, including the grievor, a laid off employee.

Assuming that an accepted call that is subsequently booked off is properly considered a refusal for the purpose of the application of article 7.7(c), I am not persuaded by the Company's argument. In my view, article 7.7 of the collective agreement, on its face, has no application to laid off employees. The article can only apply by necessary implication on its plain language to employees on the spare board, because the consequence of not being available to take a call under article 7.7(b) or refusing a call under article 7.7(c) is to be placed at the bottom of the spare board. That clearly implies that the employee occupies a space on the spare board. The grievor's name, however, was not on the spare board.

Although the Union may not have grieved the few circumstances the Company references in its brief (which the Company says were analogous to the circumstances in this case and about which the Union may or may not have been aware), that fact does not persuade me that the Union has acquiesced to the Company's interpretation that article 7.7(c) applies to laid off employees.

The Company referred me to two cases in its brief in support of its position. The first was a very brief award of Arbitrator Kates (**CROA&DR 1250).** In that case, the employee was "debarred" from duty for the duration of the run, which she had failed to accept for duty. The employee was also assessed with ten demerits in the context of fifteen previous occurrences of refusing or being unavailable for calls off the spare board. The issue before the Arbitrator was whether the grievor could essentially be "penalized" twice for the same infraction. It had nothing to do with her employment status. In fact there was every indication that the employee was on the spare board. She was not a laid off employee.

Notwithstanding what appears to be that key distinguishing factor, the Arbitrator commented on the purpose of removing an employee on the spare board for the duration of a run that is refused. It is to prevent an employee's efforts to secure preferential runs and to ensure fairness in the distribution of work off the spare board in accordance with the "first in first out" procedure established under article 7.1. The purpose is to deter the practice of "playing the spare board". That rationale does not

apply to a laid off employee who is not on the spare board. Therefore **CROA&DR 1250** does not assist the Company's case.

The Company also directed me to **CROA&DR 3766**. That case pertained to the application of overtime rates to part-time employees pursuant to certain provisions in the applicable collective agreement between the parties. On entirely different facts and collective agreement language from those in the present case, Arbitrator Picher was unable to reconcile the Union's argument with a result that would have a part-time employee working less than forty hours in a given week and less than eight hours in any given day entitled to overtime where such overtime would not be paid to a full-time employee working substantially more hours in the same week. I accept Arbitrator Picher's comments pertaining to the interpretation of collective agreement provisions in a manner that is complementary and not contradictory, and the purposive approach he took to the interpretation of the provisions before him. I am not persuaded, however, having regard to the clear language of article of 7.7(c) in this collective agreement, that Arbitrator Picher's comments apply.

One additional case provided to me was instructive: **CROA&DR 1912**. In that case, the Union objected to the fact that a junior laid-off employee was recalled, but not placed on the spare board and assigned directly to a special train while the grievor, a more senior laid off employee remained on layoff. Article 4.8 of the collective agreement provided for employees being "used off their assignments" in cases of emergencies,

temporary promotions or special assignments to be returned to those assignments as soon as practicable.

Arbitrator Picher found that article 4.8 did not apply to laid off employees but only to employees on active assignment, including employees on spare board service. Since the junior laid off employee was not fulfilling any assignment, he would not be available to be deployed for a special assignment. The Arbitrator found that article 4.8 did not apply to laid off employees and that the Company had violated the normal recall provisions of the collective agreement (requiring recall to service in order of seniority). In this case, as in **CROA&DR 1912,** it is the language of the collective agreement that is fatal to the Company's position. Just as a laid off employee has no assignment and therefore cannot be "used off their assignment", a laid off employee cannot have their name placed at the bottom of the spare board when they are not on the spare board. Article 7.7(c) can have no application to laid off employees.

For all these reasons, the grievance is allowed. The grievor is to be made whole for any lost wages suffered as a result of the Company's improper application of article 7.7(c) to him.

May 17, 2016

CHRISTINE SCHMIDT
ARBITRATOR