CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1338

Heard at Montreal, Tuesday, March 5, 1985
Concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

DISPUTE:
Interpretation of Article 27 - Bereavement Leave - Agreement No. 2, as applied to regularly assigned employees.

JOINT STATEMENT OF ISSUE:

Article 27 provides that a qualified employee is entitled to three days' bereavement leave without loss of pay.

The past practice as to the' application of Article 27 was to protect a regularly assigned employee s guarantee when he missed a trip on account of bereavement leave; that is, if the bereavement leave caused an employee to miss a trip of four days' work, the employee was compensated for four days pay; but if an employee's bereavement leave occurred during his layover, the employee did not receive any bereavement leave pay.

Following a recent arbitration award (CROA Case 1265) in which the arbitrator interpreted Article 27 dealing with Spare Board employees, the Corporation informed the Brotherhood and all employees, through regional circulars, that assigned employees who miss work on account of bereavement leave will be paid a maximum of the hours they would normally receive during the three days' leave, but any time missed in excess of those three days would not be protected by guarantee.

The Brotherhood maintained that the past practice as to the application of Article 27 should be continued.

The Corporation declined the Brotherhood's contention.

FOR THE BROTHERHOOD:	FOR THE CORPORATION:
(SGD.) TOM McGRATH	(SGD.) A. GAGNE
National Vice-President	Director, Labour Relations

There appeared on behalf of the Corporation:

Andre Leger	- Manager, Labour Relations, VIA Rail Canada Inc. Montreal
Joe Kish	- Asst. to General Manager, 0.B.S., VIA Rail Canada Inc., Montreal

And on behalf of the Brotherhood:

A. Cerilli - Representative, CBRT&GW, Winnipeg

AWARD OF THE ARBITRATOR

Following CROA Case 1265 the company issued "System Circular No. 10" dated September 14, 1984 addressed to all on-board- service staff revoking its long standing practice of compensating a regular employee for lost wages while on bereavement leave as well as protecting the balance of the employee's trip by guarantee.

It should be recalled that CROA Case 1265 dealt with spareboard employees and in effect determined that the company bore no obligation under Article 27 to such employees with respect to protecting work opportunities beyond the period of bereavement leave. Technically speaking, the company would not be required, having regard to the plain language of Article 27, to protect a regular employee's guaranteed run when called off the run because of a bereavement in the family. The trade union did not appear to dispute this notion.

Rather, the trade union relied upon the practice that VIA inherited from CN where the latter undertook to protect an employee's entire run when called away from his run because of a bereavement. As of March 12, 1982 the company reaffirmed the viability of that practice in a letter to the representatives of the trade union. Simply put, the decision in CROA Case 1265 prompted the company to revise its policy and to revoke the practice that hitherto had been applied to its regular employees.

At no time prior to the negotiation of the current collective agreement did the company advise the trade union of its intention to make the said revisions to its practice. Accordingly, at no time was the trade union given the opportunity to negotiate the adverse effects of the company's unilateral withdrawal of its admitted practice. Indeed, the company only issued System Circular No. 10 when it realized during the term of the collective agreement that it was not strictly bound by Article 27 to confer the employee benefit that was contained in its practice.

Accordingly, it is my view that this case represents an ideal circumstance where the principle of "promissory estoppel" ought to be applied to prevent the company from relying on its strict legal rights under the collective agreement. At all material times the company held out the viability of its longstanding practice and thereby lulled the trade union into the impression that it would not be revoked. Or, indeed, if there was any such intention by the company to withdraw the practice, the company ought to have comm-unicated its intention at a time the trade union could have negotiated its adverse effects at the bargaining table.

It is my view, however, that the distribution of "System Circular No. 10" serves the purpose of' notifying the trade union of the company's intentions to revert to its legal rights under the collective agreement in future as they may be expressed in the collective agreement. Because the parties are currently in negotiations for a revised collective agreement the trade union has no excuse for not being aware of the company position. Accordingly, it may take whatever corrective action it deems necessary and appropriate in light of the company's notification. In other words, the "estoppel" has been spent.

For present purposes I hold the company was bound by its practice, as aforesaid, until the expiry date of the instant collective agreement (i.e., December 31, 1984 inclusive of the control year). Thereafter, the parties will be bound by whatever rights and obligations that are contained in the revised collective agreement. To that extent the grievance is successful.

Needless to say, for the purposes of this case, I have preferred the judgment of Re Canadian National Railway Co et al vs Beatty et al 128 DLR (3d) 236 (Div Ct Ont) to Re Smokey River Coal Ltd and U.S.W. Local 7621 et al 8 DLR (4th) 603 with respect to an Arbitrator's jurisdiction to apply the doctrine of promissory estoppel.

DAVID H. KATES,
ARBITRATOR.