CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD

TO

Case No. 1596

Heard at Montreal, Thursday, June 11, 1987

Concerning

VIA RAIL CANADA

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

(Decided on the basis of the parties' written submissions)

There appeared on behalf of the Company:

M. St-Jules	- Manager Labour Relations, Montreal
W.W. Riehl	- District Supervisor, Ontario
A. Henery	- Human Resources Officer, Ontario
C. Pollock	- Labour Relations Officer, Montreal
C. Thomas	- Human Resources Officer, VIA Atlantic

And on behalf of the Brotherhood:

T.N. Stol	- Regional Vice-President, Toronto

AWARD OF THE ARBITRATOR

This grievance was heard on its merits on December 10, 1986, and resulted in a finding that the work of certain counter ticket sales positions at Brockville had been contracted out by the Corporation contrary to the provisions of Collective Agreement No. 1. The remedial portion of the order was in the following terms:

> The Arbitrator therefore finds that the contracting out of the work of the two four-hour Counter Sales positions at Brockville does not fall within the exceptions established in Appendix C to the Collective Agreement. It therefore constitutes a violation of Collective Agreement No. 1, as alleged by the Union. Accordingly the grievance must succeed. The Corporation is ordered to re-establish forthwith the abolished positions in a manner consistent with the Letter of Understanding dated September 28, 1984, and to assign the work in question to bargaining unit employees. The Corporation shall futher compensate any employee or employees adversely affected in respect of any loss of wages or benefits suffered

> as a result of the abolishment of the positions in question. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

Since the award the parties have resolved most outstanding issues. Notably, the positions in question have been reestablished and the person occupying the Monday to Friday assignment has been compensated. The only point of disagreement concerns the compensation, if any, payable in respect of the contracting out of the two 4-hour shifts falling between 0100 and 0500 hours on Saturday and Sunday.

It is common ground that that shift was permanently assigned to one employee until January 8, 1986. Thereafter it became vacant, and for the 15 week period between the departure of the permanent employee and the purported abolishment of the position by the Corporation, it was filled on an overtime basis by employees regularly scheduled during the remainder of the week. The Union maintains that the 4 employees who covered that position on an overtime basis between January 8, 1986 and March 26, 1986, the effective date of the abolishment of the 2-day position, should be entitled to compensation at overtime rates.

The Arbitrator has some difficulty with that submission. I accept that the work which was contracted out for those shifts was rightfully bargaining unit work, and some measure of compensation would, prima facie, appear to be appropriate. It is not clear to the Arbitrator, however, that if the Collective Agreement had not been violated by the Corporation the shifts in question would necessarily have been worked on an overtime basis over that 15 week period. The material establishes that early in February 1986, local management became aware that the ticket sales positions were to be abolished effective the end of March. It is reasonable to assume that absent that information the Corporation would have taken steps to fill the weekend position with a permanent employee, as it had previously, thereby avoiding the need to pay overtime rates. In other words, it is far from certain that if the Collective Agreement had not been violated and the work had not been contracted out, that the weekend shifts would have been continued at overtime rates after March 26, 1986. In the Arbitrator's view the greater likelihood is, as occurred in the wake of the original award in his case, that a permanent employee would have been assigned to those shifts, as had previously been the case between October of 1984 and January of 1986.

It is necessary in a circumstance such as this to ask what would have been the status quo had the contracting out not occurred. For the reasons stated, I am satisfied, on the balance of probabilities, that if the Company had viewed the weekend position as continuing on a regular basis, it would have hired a permanent employee to cover the eight hours in question. I cannot find that the Union has established the work would necessarily have been assigned to the four week-day employees on an overtime basis, even though that had been the case in the weeks immediately prior to the abolishment of the position. In these circumstances I cannot conclude with any meaningful degree of probability that there has been any monetary loss to the four employees concerned.

As the position in question was vacant at the time of its abolishment, it is more accurate to conclude that no single identifiable employee was adversely affected by the abolishment of the weekend position. By the same token, however, if one accepts the premise, as I do, that the position would have been occupied by a permanent employee, it must be concluded that but for the contracting out the Union would have been in receipt of dues in respect of any wages paid to that employee. To that extent the Union is adversely affected by the contracting out. Therefore, even though wages will not issue to any employee in respect of the period in question, compliance with the initial remedial order in this case would require that the Corporation pay to the Union such portion of the wages of a permanent employee as would have been withheld from him or her on account of Union dues and any other payments, if any, to which the Union would be entitled. Upon the payment of such monies to the Union the conditions of the remedial order in the instant case will be satisfied.

MICHEL G. PICHER
ARBITRATOR