CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2066

Heard at Montreal, Tuesday, 13 November 1990

Concerning

VIA RAIL CANADA INC.

And

UNITED TRANSPORTATION UNION

DISPUTE:

Claim for Assistant Conductors' rate of pay by various Toronto based employees.

JOINT STATEMENT OF ISSUE:

On October 29 and 30, 1989, and November 6, 1989, a Trainman working on Trains no. 71, 74 and 79 respectively claimed the rate of pay of Assistant Conductor as these trains operated with five or more working coaches.

The Union claims that the train crew in utilizing a fifth coach were only following the Corporation's directive to the effect that train crews should allow passengers holding valid transportation to sit in any coach they like, provided their transportation covers the accommodation provided in such coach. As such, an Assistant Conductor was required as a member of the crew as specified in Article 11.1(e).

The Corporation maintains that while the train consist may have included five coaches or more, the number of designated working cars was less than five as indicated on the respective train manifests. Furthermore, the Corporation maintains that the number of passengers that travelled on the respective trains clearly did not support the need to utilize a fifth working coach.

FOR THE UNION:	FOR THE CORPORATION:
(SGD) M. P. GREGOTSKI for: GENERAL CHAIRPERSON	(SGD) P. D. THIVIERGE for: DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

K. Taylor	-- Senior Labour Relations Officer, Montreal
F. H,bert	-- Manager, Crew Management Support, Montreal -- Observor

And on behalf of the Union:

T. G. Hodges	-- General Chairperson, St. Catharines

Present as an independent observer:

C. Foisy -- Montreal

AWARD OF THE ARBITRATOR

Article 11.1(e) of the Collective Agreement provides that where five or more working coaches are utilized an assistant conductor is to be assigned. For the purposes of this grievance it does not appear disputed that the requirements of that article are satisfied if the brakeman on duty is assigned to the position of assistant conductor, with the corresponding remuneration, without any additional personnel being assigned to the crew. The sole issue, therefore, is whether in the three fact situations giving rise to these grievances five coaches were required, so that the trainmen in question were entitled to claim the rate of pay of an assistant conductor.

It is not disputed that the conductor of a passenger train has a discretion in respect of excluding passengers from vacant cars, or alternatively, allowing them to use that equipment. That discretion must necessarily be used with a certain degree of tact and diplomacy (see CROA 2059). It also appears undisputed, as a matter of principle, that that discretion must be exercised having regard to valid business considerations and the legitimate interests of the Corporation. It appears agreed that it would be an abuse of the conductor's discretion to open a fifth passenger car to occupancy where to do so is clearly not justified by the number of passengers aboard.

The material before the Arbitrator establishes that no specific guidelines as to when to utilize vacant cars have been issued to the conductors involved in the train movements giving rise to the instant claims. Article 11.3 of the Collective Agreement provides as follows:

11.3 When an Assistant Conductor is required on a tour of duty basis:

(a) for a train operating reduced, a spare employee will be called from the list of qualified Trainmen designated as a relief source for passenger service or from the spare board; and

(b) for a train not operating reduced, the senior qualified Brakeman on the crew for the train on which such a position is required will be used. No replacement will be called for the employee so used as an Assistant Conductor.

It is common ground that in the instant grievances the trains were not operating reduced and Article 11.3(b) would govern. In approaching the application of Article 11 it appears to the Arbitrator that it is within the prerogative of the Corporation to decide, as a matter of policy, how and when the decision is to be taken as to whether a fifth working coach, or additional coaches, are to be utilized. Absent any specific guidelines or directive, the decision in that regard has been left to the discretion of the

conductor. In light of the unpredictability of passenger loads, and the need for flexibility in the field, that is an understandable policy.

As a general matter, where the evidence discloses that a conductor has a reasonable basis to decide that a fifth working coach is necessary, even though another conductor might decide otherwise, a decision so taken would appear, prima facie, to satisfy the prerequisite of Article 11.3, namely that an assistant conductor is required. If, in a given case, the Corporation should form the view that the conductor's judgement or discretion has been exercised improperly, or in a manner contrary to the Corporation's legitimate business interests, it may deal with that problem by means of directives, or, in an extreme case, by recourse to discipline.

What the instant case raises is the issue of whether a difference of opinion between the Conductor and the Corporation with respect of the advisability of utilizing a fifth working coach can bear on the claim to remuneration at the level of assistant conductor made by a brakeman who acts in conformity with the decision taken by a conductor. In each of the three cases giving rise to this grievance the passenger occupancy rate was in excess of fifty percent of the seating capacity of the working cars. While there may be some argument as to whether that number should or should not justify the opening of an additional car, it is difficult to reject out of hand the Union's submission that such variables as fluctuations in the desire of passengers for smoking and non-smoking seats, or to decline to travel in an backward position, or such other preferences as may be strongly expressed, leave some uncertainty with respect of the appropriate decision.

Where there is no arguable justification for using a fifth car the brakeman may have no valid claim. In the three cases at hand, however, the Arbitrator cannot conclude that the discretion of the conductor was exercised in a manner so abusive that it must preclude the brakeman from fairly claiming the rate of remuneration contemplated under the terms of the Collective Agreement when five working coaches were utilized. The Arbitrator is satisfied that on the objective facts disclosed, employees in the position of the grievors had no reason to believe that they were not entitled to be remunerated in accordance with the provisions of Article 11.3(b) of the Collective Agreement. While, needless to say, each case must be judged on its particular merits, in the circumstances at hand, the claims appear to be justified.

For the foregoing reasons the grievances are allowed. The Corporation is directed to pay the grievors' claims as submitted.

November 16, 1990 (Sgd.) MICHEL G. PICHER
ARBITRATOR