

I turn to consider the merits of the positions argued by the parties. In doing so, however, it is useful to reflect on the evidence adduced through witnesses at the arbitration hearing. The Arbitrator considers the evidence of Corporation witness Mr. Connie Gordon, Supervisor of On-Board Services for VIA Quebec, to be the most significant. In his position Mr. Gordon is responsible for the work of all On-Board Services employees, and he has had extensive personal experience in all aspects of operations. During the course of his testimony he was asked if he was familiar with the proposed position of Manager, Guest Services, as well as the duties and responsibilities of the position of Service Manager which is being abolished. He replied in the affirmative. When he was further asked whether any of the duties presently performed by Service Managers will not be performed by the person proposed to hold the new position, he replied with a qualified no. He said all of the functions of the Service Manager will be performed by the Manager, Guest Services, save that he had some residual uncertainty as to whether the performance of hands-on bargaining unit work in the servicing of passengers could be performed under the existing provisions of the collective agreement. When asked to estimate what percentage of a Service Manager's time might be so devoted, he estimated that it would be no more fifteen or twenty minutes in a four hour trip.

While it is not necessary to resolve the concern raised by Mr. Gordon, it may be noted that prior decisions of this Office would suggest that to the extent that the Brotherhood can claim no work ownership of any particular duties, it would appear highly doubtful that the Manager, Guest Services would be prevented from performing hands-on tasks presently discharged by the Service Manager. (See CROA 2006, above.) In the result, the Arbitrator finds, on the balance of probabilities, that the Manager, Guest Services will perform all of the duties and responsibilities of the Service Manager.

The issue then becomes whether the functions which will be performed by the Manager, Guest Services which have not heretofore been performed by the Service Manager are such as to justify the Corporation's submission that an entirely new position is established which does not duplicate the position of Service Manager or fall within the terms of the collective agreement.

As reflected in the Hyrdro decision related above, the extent of the managerial functions performed is of no consequence to the issue of whether the collective agreement has been violated. It is contrary to the agreement to transfer the entire content of a bargaining unit position to management, no matter at what level of responsibility the manager who takes over the work may operate.

If one accepts (which the Arbitrator does not) that the content of the managerial aspect of the new position is a pertinent consideration, an alternative analysis based on that approach still leaves the Corporation's position in substantial doubt. The representation of the Corporation is that 30% of the time of the Manager, Guest Services will be devoted to work off the trains, in his or her office or in the performance of some other Off-Board

administrative duties. Stressing the language of the job bulletin that the individuals holding that position will have the authority to hire, discipline and terminate employees, to evaluate the performance of employees in a number of bargaining units, to conduct investigations, to be responsible for follow-up in respect of the report of problems or equipment failures, to have an independent power of decision in respect of budget allotments, it submits that these factors all operate to take the incumbent of that position out of the purview of the Service Manager's job.

When that argument is examined closely, however, it is not compelling. While there is no extensive evidence before the Arbitrator to indicate the amount of time that a first line supervisor might spend in disciplinary investigations, and the enforcement and administration of the collective agreement, it is far from clear that it would be so extensive as to overwhelm the On-Board Services component of the job. In this regard it is worth noting that the position of Assistant Manager, On-Train Services, which is in part a predecessor of the position now being established, contains within its description an allotment of 5% of the incumbent's working time for the administration and interpretation of the collective agreement. Moreover, the Arbitrator is left in some doubt as to the practical extent of the work which will be in fact performed by the incumbent in the new position over and above that presently discharged by the Service Manager in administrative areas such as making adjustments in the number of crews, and formulating and applying budgets to govern On-Board Services.

The evidence before me is clear that Service Managers are extensively involved in the adjustment of crew complements, albeit through a power of effective recommendation rather than through a decision making power. Reality suggests, however, that in many cases those decisions are outwardly dictated by practical needs and passenger loads rather than by the exercise of a sophisticated decision making process. Additionally, while the incumbents in the position of Service Manager do not have decision making power in respect of budgets, it also appears undisputable that their present responsibility for reducing cost and promoting efficiency and productivity involves some degree of Off-Train consultation. It would also appear that many of the decisions as to the administration of the budget which could be taken over by the Manager, Guest Services will, to a great extent, be constrained by the realities of passenger loads and general directives from superiors with respect to the expenditures to be incurred in train operations. While the Arbitrator does not wish to diminish the discretion which would vest in the Manager, Guest Services, it is far from clear that the time that will be taken, either off-train or on-train by the incumbent in that position in issues concerning budget and staffing will significantly exceed the kind of discussion and recommendation time now being expended by the Service Manager. In the result, while no precise estimate can obviously be made, the Arbitrator is inclined to the view that the tasks to be performed by the Manager, Guest Services will contain all of the duties and responsibilities presently discharged by the Service Manager. In coming to that conclusion I accept that the processes involved in identifying, discussing and recommending courses of action in policy planning, budgets and staffing which are performed by the Service

Managers are all contained in the processes which lead to the next step of decision making which will vest in the Manager, Guest Services. Bearing in mind that the Service Manager also has off-train duty time, the additional management functions assigned to the incumbents in the new position may well, on the balance of probabilities, be in the order of 20% of the individual's working time, and sometimes less where circumstances involve the setting up and supervision of relatively routine train trips.

In the result, on the basis of this alternative analysis, the overwhelming majority of the time of a Manager, Guest Services will be devoted to the duties and responsibilities of the former Service Managers. The duties of the latter position constitute the core functions of the new job. On that basis, the Corporation's argument could not succeed. For the reasons related above, however, in any event the authorities are clear that the degree of management authority exercised is of no relevance to the issue of the violation of the collective agreement and the erosion of the integrity of the bargaining unit.

One of the submissions made by the Corporation is that the Brotherhood cannot be heard to protest against the erosion of the bargaining unit, by reason of the fact that the employees whose jobs are abolished pursuant to the Article 8 notice will have employment security protection, and will not lose their incomes. With the greatest respect, that view utterly fails to understand the concept of the protection of the integrity of a bargaining unit. Collective agreements are about employees, but they are also about work. As was reflected in the decision of Arbitrator Shime in the Hydro case, cited above, the fact that the four incumbents in that case were all promoted from the bargaining unit into the newly established management positions was no answer to the fact that the trade union's collective agreement bargaining rights were directly undermined. Similarly, it is no answer to the Brotherhood's concerns about the integrity of its bargaining unit to say that an entire position can be phased out in a portion of the Company's operations, eliminating the highest rated position within the wage scale, merely because the employees affected have employment security protections. Apart from concerns about the downward displacement of employees on active service, or indirect impacts on the recall rights of employees presently laid off, the Corporation cannot turn its back on its agreement with the trade union, expressly reflected in Appendix 9 of the collective agreement, that the duties therein described are, when performed in their entirety, work of the position of the Service Manager which must, by the express agreement of the parties, be provided to members of the bargaining unit. It is, of course, open to the Corporation to do away entirely with the position, subject of course to the abolishment provisions of the Supplemental Agreement. That is not what has transpired, however. In the instant case the Corporation's plan is tantamount to transferring all of the work of the Service Manager's position to the former first line of management. For the reasons related by Arbitrator Shime in the Hydro case, any such action is contrary to the terms of the collective agreement which expressly and impliedly reflect the preservation of the existence and the integrity of the bargaining unit for the duration of the collective agreement.

Lastly, the fact that the job title, the qualifications and the training program have all been upgraded for the position of Manager, Guest Services is of no material consequence to the analysis in the instant grievance. The question is not whether more highly qualified people perform the work of the bargaining unit. It is rather, whether what those people perform, whatever their qualifications, is work which has previously been performed by employees in the bargaining unit, and whether they perform it to such an extent that they virtually do all of the functions of the employees' job, so as to fall within the contemplation of the bargaining unit as described within the collective agreement.

For all of the foregoing reasons the Arbitrator finds and declares that the decision of the Corporation to abolish or phase out the position of Service Manager for the purposes of establishing the new position of Manager, Guest Services, as described in the Article 8 notices provided to the Brotherhood, the job description for the newly established position posted on March 18, 1991, and the information materials circulated to all employees under the title ``VIA Rail: plans for 1991'', constitutes a violation of the Collective Agreement and of the Supplemental Agreement. The Arbitrator therefore finds and declares that the Article 8 notice is a nullity, to the extent that it is for the purpose of assigning virtually all of the functions of the bargaining unit position of Service Manager to persons outside the Brotherhood's bargaining unit.

The foregoing conclusion does not, of course, preclude the Corporation from approaching the Brotherhood with a view to negotiating such amendment to the terms of the collective agreement as might accommodate, to the greatest extent possible, the business concerns of the Corporation and the bargaining unit integrity concerns of the Brotherhood. That may be particularly feasible in a decade where collective agreements under the Canada Labour Code have, to a substantial extent, evolved to allow for the collective bargaining representation of supervisory personnel. That, however, must be a matter for the mutual consideration of the parties.

The Arbitrator retains jurisdiction in the event of any dispute respecting the interpretation or implementation of this award.

July 18, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR