CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2319
Heard at Montreal, Thursday, 14 January 1993
concerning
VIA RAIL CANADA INC.
and
CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS
DISPUTE:
Rates of pay for newly hired persons being trained for positions in Collective Agreement No. 1 at VIA Rail Toronto.
JOINT STATEMENT OF ISSUE:
New hired persons engaged by the Corporation to be trained to work positions covered by Collective Agreement No. 1 are paid $6.00/hr. in Toronto.
The Brotherhood contends that the Corporation has violated Articles 1.2, 2.1, 3.5 and possibly Articles 4, 5, 6, 8 and 9, Articles 11.3, possibly Articles 12, 13, 16, 17, 18, 19, 20, 21,1, 23, Articles 24.5, 26.1, 27.1, 27.2, possibly 27.3, 27.8, 29.1, 30, 31.1, Articles 33, 35, 36, 37, Appendices A and G, and possibly others. The Brotherhood seeks retro-active pay for new hires based on the rates of pay in Appendix "A" commencing with the first day of training.
The Brotherhood bases its arguments on the fact that Article 11.3 provides a newly hired person with retro-active seniority to the date he was first hired as a trainee and, therefore, in their opinion, that person is also entitled to retro-active wages and benefits under the collective agreement.
The Corporation denies violating the collective agreement. The Corporation believes that article 11.3 provides retro-active seniority only and makes no reference to retro-active wages or benefits. The Corporation also maintains that article 16 clearly applies to employees only, and not to newly hired trainees.
FOR THE BROTHERHOOD:
FOR THE CORPORATION:
(SGD.) T. N. STOL
(SGD.) C. C. MUGGERIDGE
NATIONAL VICE-PRESIDENT
DEPARTMENT DIRECTOR, LABOUR RELATIONS
There appeared on behalf of the Corporation:
C. Pollock
Senior Officer, Labour Relations, Montreal
D. S. Fisher
Senior Negotiator & Advisor, Labour Relations, Montreal
J. Kish
Senior Advisor, Labour Relations, Customer Service
C. Rouleau
Senior Officer, Labour Relations, Montreal
M. St-Jules
Witness
And on behalf of the Brotherhood:
T. N. Stol
National Vice-President, Ottawa
T. Barrons
Representative, Moncton

AWARD OF THE ARBITRATOR

Is there any compelling evidence before the Arbitrator to sustain the position of the Brotherhood with respect to the intention of article 11.3? The article in question reads as follows:

QQINDENT11.3 QQINDENTThe name of an employee shall be placed on the seniority list immediately upon being employed on a position covered by this Agreement. QQBOLDA newly-hired person required to undergo training or familiarization before being employed on a position covered by this agreement will upon successful completion of such training be placed on the seniority list from the date he was first hired as a trainee.QQBOLD An employee transferred to an excepted position or on leave of absence will have appropriate notation placed opposite his name.

QQINDENT[emphasis added]

The material before the Arbitrator confirms that the second sentence of article 11.3, which is the basis of the Brotherhood's claim, had its origin in a memorandum of understanding made between the Corporation and the Brotherhood on January 15, 1987. That memorandum resolved a number of outstanding grievances emanating from Toronto, whereby the Brotherhood had complained of the fact that employees hired on the same date had different seniority dates, depending on the length of their training prior to assignment in different classifications. The parties agreed that that worked unfairness on employees in positions which required a longer period of training. The memorandum of understanding reads, in part, as follows:

QQINDENTA QQINDENTA newly hired person required to undergo training or familiarization before being employed on a position covered by the Collective Agreement will upon successful completion of such training be placed on the seniority list from the date he as first hired as a trainee. The person will be considered as an employee under the terms of the Collective Agreement from the date employed on a position covered by the Collective Agreement.

QQINDENT...

QQINDENTE QQINDENTThe foregoing amendments to the seniority dates will become effective on March 1, 1987. The introduction of the adjusted seniority dates through the application of this Memorandum of Understanding will not result in any pay claims. Notwithstanding this effective date, the new seniority date can only be applied in the next exercise of seniority from that date, and will not result in the adjustment of the employee's present employment status except in the case of lay-off.

The evidence further discloses that the above memorandum was concluded at or about the same time the parties were negotiating the renewal of their collective agreement. Minutes of the negotiations, dated January 6, 1987 confirm that as of that time the parties were in agreement in principle on the backdating of seniority to the first day of employment for a person who successfully completes training. They also recite the Brotherhood's separate demand for a training rate for persons hired to take training. The Corporation's negotiator, Mr. David Andrew, opposed that demand and countered that all items must flow together, and that if the parties could not resolve the issue of a training rate "... the rest of this item would not be agreed to." Further documentation, in the form of minutes for bargaining sessions held on January 13, 14 and 15 and dated January 29, 1987, confirms that the Brotherhood's demand for a training rate was dropped.

The Arbitrator is satisfied that the whole of the record confirms that, while the parties discussed the possibility of a training rate in the context of agreeing to the second sentence of article 11.3 of the collective agreement, they clearly did not agree on such a provision. Can it now be inferred that they intended, by retroactive seniority, to establish the wage rates of employees for trainees before they have been as confirmed as employees? In this regard it is instructive to bear in mind the definition of "employee" appearing in article 1.2 of the collective agreement.

QQINDENT1.2 QQINDENTEmployee

QQINDENT QQINDENTThe word "employee" as used hereinafter shall be understood to mean any employee holding seniority under this Agreement.

As the foregoing provision indicates, the parties do not intend that a newly hired person undergoing training is to be given the status of an employee under the terms of the collective agreement until such time as he or she holds seniority under it. It is common ground that it has been the practice of many years to treat newly hired trainees as not being employees for the purposes of the collective agreement, at least for wage purposes, until such time as they have successfully completed their training and are employed on a position covered by the agreement.

On the whole, the evidence confirms to the Arbitrator that, pursuant to a long-standing practice, the parties have consistently viewed the rate to be paid to newly hired trainees as falling outside the regulation of the collective agreement. For the reasons touched upon above, I cannot conclude that article 11.3, in its present form, was intended to change the rights of trainees insofar as the payment of wages is concerned, whether or not they successfully complete their training. As a general rule, boards of arbitration in Canada require specific language to support a conclusion that parties intended to confer a particular benefit upon employees on a retroactive basis, albeit most of the cases deal with the somewhat different issue of retroactivity to the effective date of a new collective agreement. (QQITALICSee, generally, Brown & Beatty,QQITALIC QQBOLDCanadian Labour ArbitrationQQBOLD, QQITALICthird edition, 8:1300.QQITALIC) In the case at hand there is no language within the collective agreement to support the position advanced by the Brotherhood, and the evidence of past practice and bargaining history clearly contradicts it.

For the foregoing reasons the grievance must be dismissed.

January 15, 1993

(Sgd.) MICHEL G. PICHER

ARBITRATOR