CANADIAN RAILWAY
OFFICE OF ARBITRATION
CASE NO. 2392
Heard at Montreal, Wednesday, 15 September 1993
concerning
VIA RAIL CANADA INC.
and
CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS
EX PARTE
DISPUTE:
An alleged violation of article 16.2 of collective agreement no. 2
on behalf of Mr. R. Schipper and ASC's at Winnipeg.

BROTHERHOOD'S STATEMENT OF ISSUE:
On February 3, 1992, Mr. R. Schipper and other ASC's were called at
their homes and a brief test was administered to determine their
level of French language proficiency.

The Union contends that Mr. Schipper and the other ASC's were

subject to the direction and control of the Corporation during the
test and, therefore, should have been compensated in accordance with
the minimum as set out in article 16.2 of collective agreement no.
2.

The Corporation contends that Mr. Schipper and the other ASC's were
properly compensated and there has been no violation of the
collective agreement. The Corporation argues that the scheduling of
the test was at the employee's discretion and that Mr. Schipper and
the other ASC's were not directed to report for work or for
training. The Corporation declined the grievance at all steps of the
grievance procedure.

FOR THE BROTHERHOOD:
(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Corporation:
C. Pollock - Senior Labour Relations Officer, Montreal
C. Rouleau - Senior Labour Relations Officer, Montreal
J. R. Kish - Senior Advisor, Labour Relations, Montreal

R. DeWolfe - Manger, On-Train Services, Toronto
And on behalf of the Brotherhood:
D. Olshewski - Regional Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

In the case at hand the Brotherhood has not referred the Arbitrator to any provision of the collective agreement which speaks directly to the compensation of employees who respond to the Corporation's request to take a test by telephone at their homes. The Brotherhood seeks to rely on article 16 of the collective agreement in support of its claim for four hours' terminal duty wages for Mr. Schipper for the 10 to 15 minutes which he spent taking the French language test by telephone. Article 16 provides, in part, as follows:

> 16.1 A training bulletin will be posted for a 15-day period in January of each year inviting applications from employees desiring to qualify for positions covered by this Agreement. Selections from applicants will be based on seniority, fitness and ability, and those selected will be required to undergo practical tests, write any rules and/or examinations required.
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> 16.2 (a) Assigned employees directed to undergo training during layover days shall be paid for actual hours spent in training at the pro rata rate of their assigned classification with a minimum of four hours in each 24-hour period. Such time shall be paid over and above guarantee and shall be included in the accumulation of hours under article 4.2(b).

It is common ground that in the case at hand the test which Mr. Schipper and other employees, took by telephone from their homes was not connected to any training program conducted under the terms of article 16 of the collective agreement. It was, rather, a means for the Corporation to check periodically their French language proficiency for the purposes of determining their qualification for service as Assistant Service Coordinator. Employees who hold that position are required to make bilingual announcements and provide a degree of French language service to passengers.

Part of the concern expressed by the Brotherhood stems from evidence which indicates that a number of the employees concerned were not given an option as to whether they would be tested at home, by telephone, or by telephone while they were at work. In the circumstances it argues that the employees were compelled to be available for the Corporation's purposes on their own time and that they should, therefore, be compensated.

Prior awards of this Office have considered circumstances where it was found that employees required to perform certain activities outside their normal working schedule, in relation to company business, were entitled to be paid (CROA 122, 310, 311, 436 and 1752). The foregoing cases concerned circumstances such as employees being required to attend, on their own time, at medical examinations. However, not every circumstance involving off-duty activity by an employee in relation the interests of the Corporation has been found to be compensable. In CROA 220 it was found that an employee required to report for an investigation in relation to an accident could not claim wages under the collective agreement for the time so spent. Similarly, in CROA 1752 it was found that article

16.2 of the instant collective agreement did not apply to time spent by employees in being fitted for uniforms outside their normal working hours. Additionally, in CROA 1471 the time claim of an employee in relation to time spent speaking with his supervisor on the telephone when he was called at home to be advised of an interview which he was to attend during his next regular tour of duty was not compensable. As stated in CROA 310, claims for entitlement to wages must, inevitably, be questions of fact to be determined in relation to the circumstances in any given case.

In the Arbitrator's view the case at hand is more closely analogous to the facts in CROA 1752 with respect to employees being fitted for uniforms on their own time, and to those of CROA 220 and 1471.

Bearing in mind that the Brotherhood has the burden of proof in the case at hand, it is not clear to the Arbitrator that employees could not have refused to take the telephone call at home, as opposed to at work, if that was their preference. While it may be that certain supervisors did not adequately describe the options, I am satisfied that in this case that would not be a matter going to compensation, as there was no compulsion in fact. Also significant is the evidence adduced by the Corporation which establishes that for a number of years it has been common practice to conduct telephone language testing of employees across Canada, by telephone, in their homes, from the Montreal headquarters. That practice appears to have existed since 1986, without any prior claims being made by employees or objection by the Brotherhood. In the circumstances I am satisfied that the practice and the conduct of the parties reflects a general understanding that the tests in question are voluntary, insofar as they may be taken at home, that they may be taken at work and that if employees choose to take them at home for their own convenience they are not to be remunerated for the time so spent.

For the foregoing reasons the grievance must be dismissed.

September 17, 1993 (sgd.) MICHEL G. PICHER
ARBITRATOR