

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2398

Heard at Montreal, Tuesday, 12 October 1993

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The rights of Service Managers D. Gaudet, M. Stephanos, C. Philbin, G. McDonough and M. Desautels to exhaust their rights under Article 7.2 or elect severance packages.

JOINT STATEMENT OF ISSUE:

The five Service Managers were adversely affected by an Article 8 notice effective May 31, 1992.

At that time the employees chose to exhaust their rights under Article 7.2 of the Supplemental Agreement or take laid-off status (severance or weekly lay-off benefits). This request was denied whereby the Corporation required the employees to operate from the spareboard, contrary to Article 7.2 of the Supplemental Agreement and Article 13 of Collective Agreement No. 2.

The Corporation does not believe that an employee can be laid off if he is qualified and possesses sufficient seniority to operate from the spareboard at his home terminal. The Corporation further maintains that employees can only be granted severance payments after having been laid off as indicated in Appendix C, item 5 of the Supplemental Agreement.

The Corporation denies any violation of the Collective Agreement and has rejected the grievance at all steps of the grievance procedure.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL

NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD.) C. C. MUGGERIDGE

DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Rouleau
Montreal

- Senior Officer, Labour Relations,

C. Pollock
Montreal

- Senior Officer, Labour Relations,

J. R. Kish
Montreal

- Senior Advisor, Labour Relations,

J. Lemyre - Section Director, Held Operations, Montreal

And on behalf of the Brotherhood:

T. N. Stol

- National Vice-President, Ottawa

K. Naylor - Representative, Winnipeg

AWARD OF THE ARBITRATOR

The thrust of the Brotherhood's position in this grievance is that the grievors, whose positions were abolished pursuant to an Article 8 notice under the Supplemental Agreement, should not have been compelled to take spareboard positions in the exercise of seniority rights to protect their employment security status. The Brotherhood submits that the grievors, who were regularly assigned employees, are entitled to the protections of article 7.2 of the Supplemental Agreement. By its interpretation of that provision, the Brotherhood submits that the employees must first exhaust their seniority at their home station and terminal, in respect of permanent, regularly assigned positions for which they are qualified, failing which they may exercise their seniority in a like manner to permanent positions under Collective Agreement No. 1 at their station and terminal, following which they would finally exercise their seniority rights to claim an unfilled vacancy under either collective agreement, system wide. In the Brotherhood's submission work on the spareboard is a matter of election in the employee, but is not a condition precedent to the protection of the employee's employment security status. While the Brotherhood does not dispute that an employee who does not have an assigned position who is on E.S. status may be called upon to augment the spareboard as needed, it maintains that the protection of spareboard work is not a requirement within the steps contemplated under article 7.2 of the Supplemental Agreement. The Corporation relies upon the terms of article 13 of the collective agreement, and in particular article 13.3 which deals with the exercise of seniority by employees whose positions are abolished. It submits that in the exercise of seniority rights at their home station or terminal employees must claim any spareboard work for which they have the qualifications and seniority, prior to exercising any other options within the terms of article 7.2 of the Supplemental Agreement. Once on the spareboard, the Corporation submits that the employees are entitled to the protection of the maintenance of basic rates for a period of not less than three years, in accordance with article 8.9 of the Supplemental Agreement. The following provisions of article 7 of the Supplemental Agreement and article 13 of the Collective Agreement are instructive to the resolution of this grievance:

7 Employment Security

7.1 No technological, operational or organizational change, whether under this Employment Security and Income Maintenance Agreement or the Special Agreement, will be implemented if it would result in an employee having 4 or more years of service being laid off as a result.

7.2 In determining whether a change would result in the layoff of an employee with at least 4 years of service after exhausting seniority rights at his or her home station or terminal, the employee will be considered eligible for any work on the System, in both Collective Agreements No. 1 and No. 2, for which the employee is qualified or for which the employee can, in the judgment of the Corporation, become qualified within a reasonable period of time.

13 Staff Reduction, Displacement and Recall to Service

13.1 When staffs are reduced, senior employees with sufficient ability to perform the work will be retained. During the period of staff reduction and/or layoffs, new employees will not be hired until after all available qualified laid-off employees are recalled.

13.2 In instances of staff reduction 14 calendar days' advance notice will be given to regularly assigned employees whose positions are to be abolished, except in the event of a strike or a work stoppage by employees in the railway industry, in which case a shorter notice may be given.

13.3 Employees whose positions are abolished or who are displaced may exercise their seniority up to cut-off time displacing junior employees from any regular assignment or elect to operate on the spare board providing they have the required qualifications.

13.4 Employees who exercise their seniority as provided in Article 13.3 shall submit their choice in writing within 5 calendar days of the date of displacement, and must commence work on the position of their choice within 10 calendar days of that date unless prevented by a bona fide illness or other cause for which leave of absence has been granted and failing to do so will forfeit their seniority.

[emphasis added]

The case, as presented, involves a number of issues of principle. It appears to the Arbitrator that it is appropriate, given that article 7.2 of the Supplemental Agreement has not before been the subject of interpretation, to limit the determinations of this award to the most narrow issues presented. For the purposes of clarity, it should be noted that in its brief the Brotherhood has withdrawn its claim that employees may obtain laid-off status without first protecting the spareboard at their home station or terminal, where they have the seniority and qualifications to do so. Before the Arbitrator the Brotherhood agreed that before electing lay-off employees must, within the reach of their seniority and qualifications, protect the spareboard at their home station or terminal. The issue is therefore narrowed to whether the obligation to protect the spareboard matures before the right of the employees to exercise their seniority rights, in accordance with article 7.2 of the Supplemental Agreement, to other positions, including positions under Collective Agreement No. 1 at their home station or terminal or positions under both collective agreements on a system wide basis.

Collective Agreement No. 2 makes clear distinctions between regularly assigned employees and spare employees. They are separately defined under articles 1.1 (e) and (f) of the collective agreement, respectively. Those definitions are as follows:

(e) "Regularly Assigned" - an employee working on an assignment covered by an Operation of Run Statement obtained by established bulletin procedure or by displacement.

"Spare Employee" - an employee required to perform terminal duties and be available to fill regular or extra assignments. Upon a review of the provisions of the collective agreement, as well as of the Supplemental Agreement, the Arbitrator is of the view that the position advanced by the Brotherhood, with respect to the order in which the exercise of seniority rights is to be applied is correct, as least insofar as the obligation to protect the spareboard is concerned. As the definition of "regularly assigned" employees reflects, such positions have a degree of permanence, and are claimed by bulletin or by displacement. That concept is instructive to the interpretation of article 13.3, relied upon by the Corporation. That provision makes a clear distinction between two concepts: firstly, the exercise of an employee's seniority, which on the face of the article is said to involve "displacing junior employees from any regular assignment" and, secondly, the separate concept of electing to operate on the spareboard. As the language of article 13.3 indicates, the exercise of seniority is something utilized to displace into a regular assignment, and is to be distinguished from the election to operate on the spareboard. The above reading is reinforced by the language of article 13.4 of the collective agreement. That provision speaks directly to the manner in which employees must exercise their seniority to displace into a regular assignment. As the last sentence of the article indicates, employees who fail to exercise their seniority rights are required, by their default, to operate from the spareboard. In that context, access to the spareboard is plainly not through the exercise of seniority rights, but rather through the failure to exercise them. Article 4.23 of the collective agreement similarly reflects the understanding of the parties with respect to the different treatment to be accorded regularly assigned and spareboard positions. Under the terms of article 4.23(c) when a regular assignment is temporarily suspended, without being abolished, the employees holding such positions may be assigned to operate from the spareboard in a manner therein described, with a guarantee protection, until such time as regular operations are restored, when they return to their regular assignment. A general review of the provisions of the collective agreement indicates that the circumstances in which regularly assigned employees are compelled to assume spareboard positions are narrowly circumscribed.

It is against that background that the terms of article 7.2 of the Supplemental Agreement become more clear. In the Arbitrator's view the phrase "... after exhausting seniority rights in his or her home station or terminal," appearing in that article, as a precondition to the employee being considered eligible for any work on the system in both collective agreements, must be read as referring to the claim of regularly assigned positions, either through the established bulletin procedure in the case of vacancies, or by displacement. In the Arbitrator's view the fact that the parties have expressly drawn a distinction, within the provisions of article 13.3, between an employee exercising seniority to displace into a regular assignment, on the one hand, and electing to operate from the spareboard, on the other hand, gives a clear indication of the intended meaning of the exhaustion of seniority rights within the context of article 7.2 of the Supplemental Agreement.

For the foregoing reasons the Arbitrator finds and declares that the position of the Brotherhood, to the extent that it claims that the grievors should not have been compelled to assume spareboard positions, prior to being eligible for any work on the system, in both Collective Agreements No. 1 and No. 2, for which they are qualified or can reasonably become qualified, is correct. The Arbitrator directs that the grievors be restored to their options, and be allowed to protect their rights under article 7.2 in a manner consistent with this award. They shall further be entitled to any wages or benefits which they may have lost.

October 15, 1993

(sgd.) MICHEL G. PICHER

ARBITRATOR