CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2874

Heard in Montreal, Wednesday, 9 July 1997

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

The monetary amount of Locomotive Engineer D. Arsenault's retirement incentive.

EX PARTE STATEMENT OF ISSUE:

Locomotive Engineer Arsenault provided 30.8 years of service to CN and VIA, respectively. At the time of his retirement, Locomotive Engineer Arsenault was at least 55 years of age. His age and service were in excess of 85 thereby qualifying Locomotive Engineer Arsenault to take a normal retirement incentive in accordance with article H of the Mackenzie Award.

Locomotive Engineer Arsenault at one point earlier in his career with CN resigned from his employment with CN. However, he was hired back 3 months later. He was offered the opportunity to buy back his service. He accepted this opportunity and did in fact buy back his service. He was thereafter credited with his full earlier service. Company records indicated that he was credited with this full service.

On September 15, 1995 VIA wrote to Mr. Arsenault advising him that he qualified for the normal retirement incentive. VIA also provided an estimate of his individual benefit package. This document reflected his full years of service (30.8 years). However, Mr. Arsenault was subsequently advised by VIA that he only qualified for a lump sum payment based on 25 years because he had broken his service thereby losing approximately 5 years of service for the purposes of calculating his lump sum amount. Accordingly, VIA refused to calculate his lump sum on the basis of his 25 years of unbroken service.

The Union filed a grievance alleging that VIA had violated article H of the Mackenzie award and more particularly article H(1)(b). The Corporation declined.

The Brotherhood maintains that Locomotive Engineer Arsenault is entitled to have his lump sum payment calculated on the basis of his full service. The Brotherhood also maintains that past practice supports its position. The Brotherhood also maintains that VIA is estopped from asserting its position in this case.

The Corporation declined the Brotherhood's appeal.

FOR THE BROTHERHOOD:

(SGD.) C. HAMILTON
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. Houlihan	– Sr. Advisor & Negotiator, Labour Relations, Montreal
B. E. Woods	– Department Director, Labour Relations, Montreal
T. Horvath	– Manager - Pensions, Montreal
Claude Grenier	– Officer - Special Projects, Montreal (ret'd)

And on behalf of the Brotherhood:

D. Ellickson	– Counsel, Toronto
C. Hamilton	– General Chairman, Toronto
D. Arsenault	– Grievor

AWARD OF THE ARBITRATOR

The instant grievance turns on the application of article H of the collective agreement arising out of the interest arbitration award of Mr. Justice Mackenzie. That provision establishes a retirement incentive and provides, in part, as follows:

ARTICLE H
NORMAL RETIREMENT INCENTIVE

For each position abolished as a consequence of the implementation of the Hours of Service, System of pay provisions, changes in crew consist or otherwise, a retirement opportunity will be offered. Locomotive engineers opting for a retirement opportunity will, concurrent with their retirement, be entitled to a separate allowance calculated as follows:

1 (a) A locomotive engineer who is at least 55 years of age and whose age and years of service total at least 85 will be entitled to a monthly separation allowance payable until age 65 (or time of death if earlier) which, when added to his Corporation pension, will give him an amount equal to the following percentage of average annual earnings over his best five year period:

Years of Service at time locomotive engineer elects retirement	Percentage Amount as defined above
35 (and over)	80 %
34	78 %
33	76 %
32	74 %
31	72 %
30	70 %
29	68 %
28	66 %
27	64 %
26	62 %
25 (or less)	60 %

(b) Eligible locomotive engineers, as defined in Clause (a) of this Item 1, may select, in lieu of the monthly allowance, a lump sum payment which will be equal to the current value of such monthly separation allowance payment calculated on the basis of a discount rate of ten percent per annum.

The issue to be resolved is relatively simple. The grievor, Locomotive Engineer D. Arsenault, commenced employment with Canadian National Railway Company on September 11, 1964. His employment with that company was broken for a period of three months in 1970. Thereafter he continued to work continuously for CN until he moved to VIA Rail in 1987. In 1985 Mr. Arsenault bought back his prior service at CN for pension purposes. It is common ground that pursuant to that arrangement he was credited with full pensionable service calculated from his original date of hire from Canadian National Railway Company.

At issue is the "years of service" to be attributed to Mr. Arsenault for the purposes of article H of the collective agreement. The Corporation takes the position that for the purposes of calculating the amount of separation allowance payable to the grievor, his service must be viewed as commencing in 1970, at the time he returned to work for CN after a three month hiatus in his employment. It submits that the years of service which he is deemed to have for pension purposes, in light of his buying back of prior service, has no bearing on the calculation of his service for the purposes of a separation allowance. While the Corporation recognizes that the grievor is entitled to 32 years and one month of service for the purposes of pension eligibility and pension benefits, it maintains that his deemed pensionable service cannot be applied for the purposes of calculating the separation allowance payable to him. The Corporation's representative notes that under the collective agreement the grievor has been otherwise treated as

having commenced his employment in 1970, for example for purposes of vacation entitlement and bidding, and seniority.

Counsel for the Brotherhood takes a different view. He maintains that there is nothing on the face of the language of article H to suggest that years of service for the purposes of article H must necessarily be continuous years of service. He draws to the Arbitrator's attention the decision of this Office in **CROA 2344**. In that case the union grieved on behalf of an employee who had been re-hired, after a brief absence from work, and a long period of prior service with the company. The union maintained that the company wrongfully applied starting rates to the individual where the entitlement to such rates was premised on an employee having 157 weeks' service with the company. In that case the Arbitrator noted that the collective agreement made separate provision for certain rights and protections based on "continuous employment", and concluded that there was no apparent intention to require that the qualifying weeks of service within the pay scale provisions must necessarily be continuous.

While I am of the view that **CROA 2344** is of limited, if any, application in the case at hand, I am nevertheless left in some difficulty as regards the position advanced by the Corporation. Firstly, as argued by Counsel for the Brotherhood, there nothing in the language of Article H which confirms that the phrase "years of service" selected by Mr. Justice Mackenzie must necessarily mean years of continuous service. From a purposive point of view, it appears to the Arbitrator that the learned interest arbitrator generally intended an employee's entitlement to a separation allowance to follow the general principles governing his or her entitlement to a pension. In this regard it is useful to note that the phrase "years of service" appears in both item 1(a) of article H, the paragraph which describes the conditions of eligibility for the separation allowance as well as in the heading to the column which lists years of service, for the purposes of expressing the percentage amount of the average annual earnings over the employee's best five year period.

Part of the difficulty presented by the position of the Corporation is that, as its representative candidly concedes, the Corporation did interpret the phrase "years of service" appearing in paragraph 1(a) so as to find the grievor to be eligible for a separation allowance. It is not disputed, however, that if his service were computed as of 1970 he would not have the total of 85 points necessary to qualify. For that purpose, the Corporation included his prior broken service. However, the Arbitrator cannot see how the interest arbitrator can be taken to have intended to phrase "years of service" to have a separate meaning in the qualifying paragraph and in the table of years of service which immediately follows. Significantly, I think, the fact that the Corporation considered it equitable to allow the grievor to participate in the separation allowance, by viewing him as qualified, tends to support the Arbitrator's view, expressed above, that Mr. Justice Mackenzie generally intended the concept of years of service for the purposes of the separation allowance to be concurrent with the entitlement of employees to pension, also based on their years of service. That, moreover, would appear to be a purposively reasonable interpretation, with the amount of the separation allowance being made to depend on the longevity of actual service to the Corporation. I am satisfied, therefore, that the interpretation of the phrase "years of service" found in paragraph 1(a) applied by the Corporation is correct, and that it cannot be interpreted differently for the purposes of the table of years of service which immediately follows the paragraph.

For the foregoing reason the grievance is allowed. The Arbitrator directs that the grievor be compensated forthwith the balance between the separation allowance paid to him and the separation allowance to which he is properly entitled in accordance with the interpretation of article H of the collective agreement contained in this award.

July 16, 1997

(signed) MICHEL G. PICHER
ARBITRATOR