CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3022
Heard in Montreal, Tuesday, 12 January 1999
concerning
ST. **LAWRENCE & HUDSON RAILWAY COMPANY**
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:

Dismissal of Locomotive Engineer Andre Verner, Montreal, Quebec.

JOINT STATEMENT OF ISSUE:

On March 24, 1998 Mr. Andre Verner, locomotive engineer, was issued a Form 104 advising that he had been dismissed from Company service for:

> Improper submission of monetary Maintenance of Basic Rate claims pursuant to Article E. I of the VIA Special Agreement, being unavailable for duty, thereby improperly enhancing your earnings and severing the bond of trust that is implicit in an employee - employer relationship, during the period of December 16, 1994 to April 3, 1997, while employed as a Locomotive Engineer on the Quebec Division.

The Union submits that the investigation into this matter clearly established that Mr. Verner submitted claims for a VIA incumbency pursuant to the VIA Special Agreement for periods in which he was performing duties inherent to his position as a Union Representative. The Union submits that the Company has always knowingly paid claims for the VIA incumbency to employees on Union business. It is the position of the union that the practice developed with the inception of the VIA Special Agreement and was continued for a number of years. Accordingly, the union submits that the Company demonstrated a clear acceptance towards applying Clause EA of the VIA Special Agreement in the manner that Mr. Verner had claimed.

Additionally, the Union submits that the actions of the Company in disciplining Mr. Verner have been motivated by anti-union animus directed against Mr. Verner in his capacity as a Union member and representative.

Based on the foregoing, the Union has requested that the discipline assessed and noted on the Form 104 be expunged from Mr. Verner's work record. Additionally, that Mr. Verner be immediately reinstated and reimbursed for all lost earnings, including interest, seniority, and benefits that he would have qualified for during the period of his dismissal. In the alternative, the Union submits that the discipline assessed was excessive.

The Company has declined the Union appeal.

FOR THE COUNCIL: **FOR THE COMPANY:**
(SGD.) R. S. MCKENNA **(SGD.) G. CHEHOWY**

GENERAL CHAIRMAN FOR: **DISTRICT GENERAL MANAGER**

There appeared on behalf of the Company:
G. D. Wilson - Counsel, Edmonton
G. Chehowy - Manager, Labour Relations, Toronto
S. Bromley - District General Manager, Toronto
K. Fleming - Counsel, Edmonton
R. Martel - Labour Relations Officer, Toronto
J. Blotsky - Manager Operations, Quebec
C. Westcott - Field Operations Analyst, Toronto
B. Butterworth - Labour Relations Officer (ret'd)
J. Cuin - Assistant Superintendent (ret'd)
And on behalf of the Council:
J. Yach - Counsel, Ottawa
R. S. McKenna - General Chairman, Calgary
G. HaII6 - Vice-President, Canadian Director, BLE, Ottawa
T. G. Hucker - Vice-President, National Legislative Representative, Ottawa
D. C. Curtis - General Chairman, Calgary
B. Brunet - Local Chairman, Montreal
B. Suffel - Local Chainnan, Smiths Falls
A. Verner - Grievor

AWARD OF THE ARBITRATOR

The grievor commenced employment with the Company as a telegrapher in 1963, He thereafter became a conductor and, in 1974, a locomotive engineer. He was promoted into the ranks of management as a trainmaster from 1985 to 1988, returning to the engineer's trade in November of 1988. In early 1990, at the time of the implementation of the reductions of service in VIA Rail he was employed as a locomotive engineer in passenger service on the Trois Rivieres Subdivision. He then bid back into freight service with the Company, with the benefit of a maintenance of earnings incumbency negotiated as part of the VIA Special Agreement.

From 1991 onwards Mr. Verner, who had always been active in the Union, assumed the position of legislative representative for Division 788 of the Brotherhood. Thereafter, from 1992 to November of 1997, he was the local chairman for Division 788. In both capacities he was compelled to devote substantial amount of time to union business involving workers' compensation matters, municipal and provincial legislation, grievances and general matters concerning collective bargaining.

On March 24, 1998 Mr. Verner was dismissed for what the Company viewed as his improper submission of maintenance of basic rate claims under the VIA Special Agreement. The Company maintains that over a number of years Mr. Verner improperly enhanced his earnings by claiming an MBR incumbency for periods of time he was on union duties, and therefore unavailable for work. It submits that his practice in that regard was fraudulent and severed the bond of trust implicit in his employment relationship, thereby

justifying his discharge. The Company's position is based on the application of article E. I of the VIA Special Agreement which reads, in part, as follows:

> E.1 ... An incumbency for the purpose of maintaining an employee's earnings, shall be payable provided:
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> (a) in the exercise of seniority, he first accepts the position with the highest earnings at his home terminal to which his seniority and qualifications entitle him. An employee who fails to accept the position with the highest earnings for which he is senior and qualified, will be considered as occupying such position and his incumbency shall be reduced accordingly. In the event of dispute as to the position with the highest earnings to which he must exercise seniority, the Company will so identify;
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> (b) he is available for service during the entire four week period. If not available for service during the entire four week period, his incumbency for that period will be reduced by the amount of earnings he would otherwise have earned.; and
>
> **(c)** all compensation paid an employee by the Company during each four week period will be taken into account in computing the amount of an employee's incumbency.
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> (emphasis added)

The Company submits that, in keeping with sub-paragraph (b), during such time as he was on union service the grievor was not available for service and should, in consequence, have reduced his incumbency claim for the time in question. It submits that his failure to have done so resulted in an overpayment to him of wages in excess of $14,000.00. The Company notes that where a union officer is required to transact union related business at the request or direction of the Company, such time is considered time worked or time available, and is not applied in reduction of an employee's maintenance of earnings incumbency. However, where time off for union business is at the initiative of the union the individual is to be treated as unavailable for work and his or her incumbency accordingly reduced.

It appears that the record of the grievor's handling of his maintenance of earnings incumbency came to the attention of the employer when, in late 1996, a survey of employee earnings on the St. Lawrence and Hudson Railway indicated that Mr. Verner's wages were unusually high, particularly having regard to the work he had missed by reason of his union duties. Further examination of the records indicated that other employees involved in union duties did not make MBR claims in the same manner as Mr. Verner, with the exception of one individual who held an office similar to the grievor's in the United Transportation Union.

The allegation made by the Company against Mr. Verner is tantamount to an

accusation of theft. In this, as in any disciplinary matter, the burden of proof is upon the Company. To the extent that the charge against him is extremely serious, the proof in support of its case must be relatively clear and compelling. When the entire record is reviewed, however, the Arbitrator is left in considerable doubt as to whether the Company's burden has been discharged.

The record reveals that the grievor resumed his union activities in August of 1991, and thereafter had to deal with time devoted to union business for the purposes of his maintenance of earnings claims. According to his account he was then advised by Mr. Maurice Brisebois, then the local chairman of Division 788, that the practice was to consider union officers as being "available" for service for the purposes of maintenance of earnings calculations under the VIA special agreement when they were engaged in union activities. Based on that advice thereafter Mr. Verner consistently claimed his wage incumbency for all time spent in union business, whether it was Company initiated or not. He relates that he sought confirmation of the position communicated to him by Mr. Brisebois by consulting with a clerical person, Ms. Anna Giannakis, who was responsible for the administration of the MBRs under the VIA agreement. He relates that he stated to Ms. Giannakis what he had been told by Mr. Brisebois, and that she confirmed that the practice so described was in keeping with the manner in which payments were made under the VIA agreement.

The material before me discloses that Mr. Verner was a kept copious records of his wages claims over the years. A review of those documents leaves little doubt that his practice in respect of claiming his incumbency for time spent on union initiated union business was clearly open and consistent. Maintenance of earnings claims forms returned to Mr. Verner clearly reflect notations indicating approval of his claims, and an apparent understanding as to his precise activitiese. For example, a claim relating to the four week period from November 15, 1996 bears the notation "Okay - acc VIA off union b". Similarly, the same form for the period from January 10, 1997 contains the notation " 12 days off union business" apparently approving these days as part of his claim for incumbency. To underscore the openness demonstrated by Mr. Verner in his dealings with maintenance of earnings wage claims, it is noteworthy that in his first submission in that regard, made in relation for the period from September 27, 1991 he added the following note to Ms. Giannakis: "Anna, for your info! October 23rd I was off for union business. Thank you - Andre".

The record also indicates that on a number of occasions the Company's officers reviewed and adjusted Mr. Verner's incumbency claims. For example, on June 16, 1994 a notice was issued from the Administrative Services Department, copied to Mr. Verner, noting that his incumbency claim had been reduced for the period from May 6 to June 2, 1994 by reason of his having failed to bid on the position with the highest earnings available. A similar adjustment was made in the period April 7 to May 4, 1995 and again for the period May 31 to June 27, 1996. It appears to the

Arbitrator that based on these records Mr. Verner had every reason to believe that responsible Company officers were examining quite closely the nature of his incumbency claims and must be aware of the basis upon which he was making them.

Perhaps most significantly, for what it reveals of the grievor's state of mind, in 1996 the Company appeared to give a very clear confirmation of the correctness of the practice being followed,by Mr. Verner. By a letter dated September 9, 1996 Mr. Verner received notice from the Company that his claim of availability for periods during which he was on union business was being disallowed. Significantly, however, the same day he was provided with a second letter entitled "Corrector", which infori-ned him that he was in fact considered available for service for eight days that he was engaged in union business, and that his incumbency payment was readjusted upwards accordingly.

The record is even more extensive. It appears that in 1995 Mr. Verner was advised by Ms. Giannakis that she had heard something to the effect that his VIA incumbency might be reduced for time off on union business. Based on that information Mr. Verner contacted Mr. Ross McIntosh, supervisor of the Company's data centre. Mr. Verner explained to Mr. McIntosh what he had learned from Ms. Giannakis. The latter indicated that he would inquire with
the labour relations department and get back to Mr. Verner. Thereafter Mr. McIntosh contacted Mr. Verner and confirmed to him that his VIA incumbency would not be reduced for time off on union business. Understandably, Mr. Verner continued to make his claims in the same manner.

Faced with the foregoing record, the Arbitrator is at a loss to understand the basis for the claim of the Company to the effect that Mr. Verner knowingly attempted to defraud the Company of incumbency payments to which he was not entitled. Accepting the Company's interpretation of the rules of availability under article E of the VIA Special Agreement, the evidence falls far short of establishing a knowing or deliberate plan of fraud on the part of Mr. Verner. On the contrary, the documentation confirms that he was at all times open with the Company in respect of his practice of claiming his maintenance of earnings incumbency and, significantly, the Company's own actions in respect of regular approvals and periodic adjustments of his claims gave him reason to believe that the practice he was following was correct. In the result, I cannot find that the Company has established any basis upon which to assess discipline against Mr. Verner.

The grievance is therefore allowed. The Arbitrator directs that the grievor be reinstated into his employment forthwith, with compensation for all wages and benefits lost, and without loss of seniority. As a condition of
reinstatement Mr. Verner must, however, as undertaken by his counsel at the hearing, agree to an arrangement for the repayment of the monies which he owes to the Company by reason of the payments erroneously made to him.

Should there be any dispute as to the interpretation or implementation of this award the matter may be spoken to.

January 18, 1999

MICHEL G. PICHER
ARBITRATOR