CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3347

Heard in Edmonton, Tuesday, 8 July 2003

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)
EX PARTE

DISPUTE:
Concerning the issuance of an Article 8 Notice abolishing 9 Assistant Service Coordinator's positions in Western Canada.

UNION'S STATEMENT OF ISSUE:
On March 11, 2003, the Corporation issued a notice pursuant to the provisions of the Supplemental Agreement, that it would abolish 9 Assistant Service Coordinator's positions and simultaneously create 9 Senior Service Attendant positions.

It is the Union's position that there exists no Technological, Operational or Organizational change which would justify such a notice. It is further the Union's position that the notice is in violation of collective agreement no. 2, and article 8 of the Supplemental Agreement. The notice is also in violation of the New Era Passenger Organization (NEPO) mediation/arbitration settlement of Judge George Adams.

The Corporation's position is that this action is being taken as it relates to language complaints lodged by employees pursuant to the Official Languages Act. The Corporation further argues that the action will provide further opportunities to unilingual employees. The Union disagrees, and finds the action to be in contradiction to the Commissioner of Official Languages Reports; and the Official Languages Act as it relates to this issue. It is the Union's position that the measures taken by the Corporation are an effort at cost reduction, and will result in a reduction of rates of pay for employees, as well as a loss of bilingual training opportunities mandated by the Act and the Report.

The Union seeks to have the notice dated March 11, 2003 struck, and declared a nullity; with an order that the positions in question cannot have their rates of pay unilaterally reduced.

CORPORATION'S STATEMENT OF ISSUE:
As part of the NEPO initiative, the Corporation and the Union agreed to introduce a 2nd Assistant Service Coordinator (ASC) position on-board the Western Transcontinental to ensure a bilingual presence with the Service Manager (SM) was at rest. Subsequently, the Official Languages Commission received a complaint from Union members alleging that the bilingual requirement of that position restricted access for senior employees who could otherwise perform the duties.

The results of the investigation into the complaint were tabled in May 2002. In its assessment, the Commissioner's Office found it excessive to restrict all ASC assignments on the Western

Transcontinental to those employees who meet the bilingual requirements of the position. It further indicated that VIA Rail should make one (1) ASC assignment accessible to otherwise qualified unilingual employees by providing second-language training.

Upon review, the Corporation chose to change how it staffed and operated the Western Transcontinental service. Along with the change in service, it abolished 9 ASC positions and created 9 SSA positions. This position does not have the bilingual designation. Those employees affected by the job abolishment have the protection of the Employment Security and Income Maintenance Agreement.

The Corporation maintains the right to organize the service and staff on its trains in compliance with the collective agreement and subject to the ESIMA. The Corporation denies that they have acted in violation of the Act or contrary to the recommendations of the Commission.

FOR THE UNION: FOR THE CORPORATION:
(SGD.) D. OLSHEWSKI (SGD.) L. LAPLANTE
NATIONAL REPRESENTATIVE FOR: DIRECTOR, LABOUR RELATIONS
There appeared on behalf of the Corporation:
L. Laplante – Senior Officer, Labour Relations, Montreal
D. Wolk – Director, Customer Services, Winnipeg
G. Peck – Manager, Customer Services, Winnipeg
And on behalf of the Union:
D. Olshewski – National Representative, Winnipeg
D. M. Hazlitt – Regional Bargaining Representative, Edmonton

AWARD OF THE ARBITRATOR

The issue in the case at hand is whether the Corporation failed in it's collective agreement obligations when it provided a notice to the Union under article 8 of the Supplemental Agreement concerning the abolishment of nine Assistant Service Coordinator positions and the corresponding creation of nine Senior Service Attendant positions.

The evidence before the Arbitrator establishes, beyond dispute, that the Corporation's actions were prompted, in part, by complaints brought by a group of employees to the Commissioner of Official Languages. In particular, there was concern among unilingual employees that the designation of two Assistant Service Coordinator (ASC) positions on Western transcontinental trains as bilingual operated unduly to discourage the upward promotion of non-bilingual employees. Although the ultimate report released by the Commissioner's office, which only has the force of recommendations, confirmed the need for the bilingual ASC positions, upon reflection the Corporation came to the view that it could in fact eliminate one of the two ASC positions on the transcontinental trains and replace that position by an equivalent number of lower-rated positions of Senior Service Attendant (SSA). The Corporation's reasoning is to the effect that proper scheduling would allow the ASC to replace the Service Manager, also a bilingual position, when that person was on rest, and that a sufficient bilingual capacity would thereby be maintained.

The Union's grievance asserts firstly that there was no organizational or operational basis for the step taken by the Corporation and, secondly, that it's actions are in violation of the NEPO settlement of March 11, 1998.

The Arbitrator deals with the second allegation first. The NEPO agreement flowed from the decision of the Corporation to abolish the positions of conductors and assistant conductors on

it's trains in 1998. As a result, it agreed with the Union to establish Service Manager (SM) positions in transcontinental, corridor and remote services. The SM position was recognized as being bilingual, and provision was made in the memorandum of agreement for the training of persons who would otherwise qualify as SMs. The only reference within the NEPO agreement to the ASC is found in paragraph 12 which reads as follows:

The designated night relief employee for the SMT or SMR shall be an Assistant Service Coordinator.

The Arbitrator can find no violation of any of the provisions of the NEPO agreement in the actions taken by the Corporation. The material before me confirms that the designated night relief of the Service Manager in transcontinental service (SMT) remains the Assistant Service Coordinator. There is nothing within the provisions of the NEPO memorandum of agreement of March 11, 1998 to require any particular number of Assistant Service Coordinator positions in transcontinental service, beyond the bare requirement for relief of the Service Manager. On that basis I can find no violation of that agreement.

The Arbitrator must confess to some difficulty in understanding the submission of the Union to the effect that no operational or organizational change would justify the Corporation's decision to abolish nine Assistant Service Coordinator positions and substitute for them nine Senior Service Attendant positions. There is nothing within the Supplemental Agreement which necessarily requires some external event, beyond the Corporation's control, as a pre-condition to implementing an operational or organizational change. Indeed, it is the very decision to make an organizational change, at the employer's initiative and at it's discretion, which is the basis for acknowledging that employees should in that circumstance be entitled to certain protections as provided in the Supplemental Agreement. It remains the prerogative of the Corporation to organize its work force as it sees fit, subject of course to the requirements of law and the provisions of the collective agreement. The Arbitrator has been referred to nothing in law nor within the terms of the collective agreement or the Supplemental Agreement which would prevent the Corporation from changing the deployment of employees on its transcontinental trains in the way it has.

In part, the Union's representative argues that the Company should be estopped from taking the action which it has pursued. I fail to see in the material before me any significant evidence which would sustain the grounding of an estoppel. The Union has pointed to no provision of the collective agreement, nor to any correspondence or undertaking made verbally or in writing by the Corporation in the past as to the number of ASC positions which would be utilized in transcontinental service. The most that can be gleaned from the discussions surrounding the NEPO agreement would appear to be that the Corporation represented to the Union that it would be necessary to establish the new position of Service Manager in the wake of the abolishment of the conductor and assistant conductor positions, it being understood that certain of the on-board duties of conductors would thereafter be handled by the Service Manager. That undertaking was coupled only with an agreement that when service managers are on night relief they are to be replaced by "an Assistant Service Coordinator". There is, very simply, nothing in the record which would indicate any representation on the part of the Corporation that it would maintain any given number of Assistant Service Coordinator positions within its complement or in transcontinental service. The fact that the concerns raised by employees as to their access to the ASC positions, in the form of complaints made to the Official Languages Commissioner, may have caused the Corporation to re-examine the organization of its work force in transcontinental on-board service does not of itself suggest that the management prerogatives of the Corporation are somehow limited. Any such limitation must, absent estoppel – which I am satisfied does not apply in the case at hand – be found within the provisions of the collective

agreement, the Supplemental Agreement or some other similar document of understanding made between the parties. There is no evidence of any such agreement or any such limitation in the material before me.

On the foregoing basis the grievance must be dismissed.

July 14, 2003 (signed) MICHEL G. PICHER
ARBITRATOR