

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3365**

Heard in Montreal, Thursday, 11 September 2003

concerning

VIA RAIL CANADA INC.

and

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
EX PARTE**

DISPUTE:

Claim of Locomotive Engineer Nelson Gagnon, pin 001301, for payment of the monthly guarantee.

BROTHERHOOD'S STATEMENT OF ISSUE:

On October 19, 2001, Locomotive Engineer Gagnon was operating train no. 21. During his tour of duty a violation of rule 429 occurred.

The Corporation held the investigation on October 24, 2001.

Mr. Gagnon submitted a claim for the time he lost on his regular assignment plus for the time of the investigation, which was held on his day off.

The Corporation refused to pay for the time he lost on his regular assignment. The Corporation's position is that Mr. Gagnon is entitled to 8 hours' pay for October 24, 2001.

The Corporation is not prepared to change their position in this case.

FOR THE BROTHERHOOD:

(SGD.) R. LECLERC
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan - Senior Manager, Labour Relations, Montreal
A. Livingstone - Manager, Customer Services
G. Benn - Labour Relations Officer, Montreal
A. Iacono - Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

R. Leclerc - General Chairman, Grande-Mère
G. Hallé - Canadian Director, Ottawa
C. I. SMith - Vice-General Chairman,

AWARD OF THE ARBITRATOR

The record discloses that the grievor was the subject of an alleged CROR rule 429 violation. It appears that he reversed his train past a stop signal. As the evidence disclosed that he was under the direction of another crew member, and was entirely innocent of wrongdoing, no discipline was ultimately issued against him. At issue is the payment of the grievor for the days held out of service for the investigation between October 24 and October 26, 2001.

Firstly, it appears that part of the investigation involved what would have been scheduled rest time. The Corporation accepts that the grievor should be paid for that time. With respect to what would have otherwise been the grievor's working days, however, the Corporation maintains that its sole obligation, following the decision of the board of arbitration chaired by Mr. Justice Mckenzie, was to protect the grievor's guarantee. He was not, it submits, entitled to the wages which he would otherwise have earned, but for having been held out of service. The Brotherhood maintains that the award of Mr. Justice Mckenzie made no change in the entitlement of employees with respect to that aspect of the collective agreement.

It is not disputed that under the terms of the collective agreement in force before the award of Mr. Justice Mckenzie in 1995 an individual in the grievor's circumstance would clearly have been paid for his actual time lost. In that regard reference is made to article 70 of the collective agreement then in force, entitled "Held for Investigation, Attending Court and Attending Company Meetings", which provides, in part, as follows:

70.1 Locomotive engineers who, during their off duty time, are required to attend Company investigations or who are held off work by the Company for such investigations, and no responsibility is attached to them in connection with the matter under investigation (i.e. not subject to discipline), and locomotive engineers who are held off work on Company business on order of the proper officer, will be paid as provided by paragraphs 70.2 or 70.3.

70.2 Locomotive engineers in assigned service will be paid actual time lost; when no time is lost, pay will be allowed hour for hour for the first 8 hours in each 24 hours so held (computed from time required to report or to deadhead) at a rate per hour of 1/8th of the daily guarantee for passenger service.

70.3 Locomotive engineers in unassigned service or on the spare board will be allowed pay hour for hour for the first 8 hours in each 24 hours so held (computed from time required to report or to deadhead) at a rate per hour of 1/8th of the daily guarantee for passenger service, and if they lose their turn pay will be allowed for a full day of 8 hours.

The Corporation maintains that with the McKenzie award a new limit was placed on the compensation of employees held for investigation, regardless of the result of the investigation. In that regard it draws to the Arbitrator's attention the following language of the McKenzie award:

3. (a) Locomotive engineers missing their assignments for the following reasons, as defined in the Collective Agreement, will have their guarantee protected:

Attending court
Bereavement leave
Jury duty
Periodic rules - when scheduled by the Corporation
Periodic medicals - when scheduled by the Corporation
Investigations
Inquests
Corporation initiated meetings

3 (b) Payments for the following, if incurred during layover, will be made in accordance with the provisions of the collective agreement. They shall be over and above the guarantee and shall not be included in the accumulation towards 160 hours:

Periodic rules
Periodic medicals
Investigations
Corporation initiated meetings

There is a fundamental disagreement between the parties as to the meaning and intention of the foregoing provisions. The Corporation's representative maintains that McKenzie award implicitly abolished the pre-existing provisions of the collective agreement governing the payment of employees held for investigation, reproduced above, and that the only protection

which employees retained in that regard was the guarantee of 160 hours in each four week period, a guarantee first established in the Mckenzie award which converted employees from a mileage rated to an hourly rated pay system. The Brotherhood submits that there was no intention on the part of Mr. Justice Mckenzie to abolish or amend other provisions of the collective agreement concerning of employees held for investigation. Rather, it submits that the language of paragraphs 3(a) and (b) handed down by Mr. Justice Mckenzie was solely for the purpose of clearly delineating the manner in which the guarantee was to be protected in the event of an employee being held out of service for an investigation, and ensuring that rest days be protected, over and above the guarantee.

In support of its position the Brotherhood draws to the Arbitrator's attention the language of the current consolidated version of the collective agreement, referred to as collective agreement 1.4 between the Brotherhood and VIA Rail Canada Inc. Under that collective agreement article 19 deals with the payment of employees held for investigation, and provides, in part, as follows:

19.1 Locomotive engineers who, during their off duty time, are required to attend Corporation investigations or who are held off work by the Corporation for such investigations, and locomotive engineers who are held off work on Corporation business on order of the proper officer, will be paid as provided in articles 19.2 or 19.3.

19.2 Locomotive engineers in assigned service will have guarantee's protected for actual time lost; when no time is lost, pay will be allowed hour for hour for the first 8 hours in each 24 hours so held (computed from time required to report or to deadhead) at a rate per hour of 1/8th of the daily guarantee for road service. Payment be over and above the guarantee and shall not be included in the accumulation towards 160 hours. (sic)

19.3 Locomotive engineers on the spare board will be allowed pay hour for hour for the first 8 hours in each 24 hours so held (computed from time required to report or to deadhead) at a rate per hour of 1/8th of the daily guarantee for road service. Payment will be over and above the guarantee and shall not be included in the accumulation towards 160 hours, and if they lose their turn pay will be allowed for a full day of 8 hours.

The Arbitrator has some difficulty with the interpretation of the foregoing provisions advanced by the Brotherhood. It is clear that articles 19.2 and 19.3 are not identical in language to the language of the prior agreement, as reflected in articles 70.2 and 70.3 reproduced above. In the instant case the critical language is that found in article 19.2. Assuming, without finding, that that language was in force at the time of the instant grievance, a straightforward reading of the language of the article raises substantial doubt as to the correctness of the Brotherhood's position.

In the Arbitrator's view there are two parts to the article. The first concerns the treatment of "actual time lost" when an employee is held out of service for an investigation. The first portion of the article appears to clearly provide that in that circumstance the individual in assigned service is to have their guarantee protected. That is substantially different from the prior language of article 70.2 to the effect that a locomotive engineer in assigned service "... will be paid actual time lost". The second part of article 19.2, which is not at issue in this grievance, relates to the circumstance of rest days or, in the language of the article, "... when no time is lost". In that circumstance the employee is to be paid on the formula provided therein, and such payment may be over and above the guarantee.

I am satisfied that the language of article 19.2 of the collective agreement was refashioned so as to be consistent with the substantive content of articles 3(a) and 3(b) of the collective agreement in the wake of the McKenzie award. Nor are these changes entirely negative as regards the interests of employees. Significantly, the guarantee protection now included in article 19.2, unlike the thrust of the previous article 70.1, is no longer dependent upon the outcome of the investigation. In other words the protection of the guarantee appears to be independent of whether or not the employee is found to be responsible for the error or misconduct which is the subject of the investigation. Most significantly, for the purposes of this grievance, under the new language, which I am satisfied reflects the continuous arbitrated result from the time of the McKenzie award, a locomotive engineer in assigned service who is held out of service for an investigation is to have wage protection to the extent of his or her guarantee for actual time lost. It is only in the circumstance where no time is lost, for example when an investigation is scheduled on an employee's rest day, that an employee is to receive wages which can accumulate over and above the guarantee.

For all of the foregoing reasons the grievance must be dismissed.

September 19, 2003

(signed) MICHEL G. PICHER
ARBITRATOR