



Canada Industrial Relations Board ● Conseil canadien des relations industrielles

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Reasons for decision

George Cairns et al.,

applicants,

and

International Brotherhood of Locomotive Engineers,

respondent,

VIA Rail Canada Inc., United Transportation Union, Canadian
National Railway Company,

intervenors,

Board File: 18938-C

CIRB/CCRI Decision no. 230

May 15, 2003

The panel of the Board was composed of Ms. Michele A. Pineau, Vice-Chairperson, sitting alone pursuant to section 14(3)(c) of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). This matter was heard in Toronto on March 6 and 7, April 22 to 24, 29 and 30, September 11 to 13, 16 to 19, and 23 to 26, and December 2 to 5, 2002. A site visit also took place on July 3, 2002.

Appearances

Messrs. Michael A. Church and Douglas J. Wray, for George Cairns et al.;

Messrs. James L. Shields and Graham Jones, for the International Brotherhood of Locomotive Engineers;
Mr. Jean H. Lafleur, Q.C. and Ms. Louise Béchamp, for VIA Rail Canada Inc.;
Mr. John A. Coleman, for Canadian National Railway Company;
Messrs. Michael A. Church and Douglas J. Wray, for the United Transportation Union.

PART I

I - Background of the Matter Before the Board

[1] In 1977, VIA Rail Canada Inc. (VIA or the employer) was created as a federal crown corporation to take over passenger services in Canada previously provided by Canadian National Railway (CN) and Canadian Pacific Railway (CP). To this end, VIA continued to use CN running trades: locomotive engineers and the conductors, assistant conductors and yardmen (hereinafter collectively referred to as "the conductors"). In 1987, VIA proceeded to hire its own running trades to achieve some cost efficiencies. This was made possible in part through the *Railway Passenger Services Adjustment Assistance Regulations, S.O.R./77-869*, which provided the basis for negotiating special agreements, to preserve benefits and to set the terms and conditions of those benefits for employees "adversely affected by the implementation of changes" of a transfer of employment from CN to VIA. On March 6, 1987, a Special Agreement was concluded between VIA, CN and the United Transportation Union (UTU) as the bargaining agent for the conductors. The Special Agreement established a mechanism for a 1987 to 2024 reciprocal rights period, during which "adversely affected employees" having at least two years at CN as of June 25, 1987, could transfer between CN and VIA in the event of reductions in staff.

[2] A separate Special Agreement, including a Transfer Agreement was also concluded in June 1987 between CN, VIA and the International Brotherhood of Locomotive Engineers (BLE) as the bargaining agent for the locomotive engineers at VIA and CN for similar benefits.

[3] In 1997, VIA decided to implement further cost efficiencies by merging the work of the locomotive engineers and conductors on its trains through its New Era Passenger Operations Initiative (NEPO). In furtherance of its NEPO initiative, VIA filed an application under section 18 of the *Code* to merge the locomotive engineers and

conductor bargaining units. On September 22, 1997, the predecessor Canada Labour Relations Board (CLRB) agreed to replace the two bargaining units with a single bargaining unit of running trades at VIA. The CLRB also ordered a representation vote, which resulted in the BLE becoming the bargaining agent for the new bargaining unit.

[4] VIA's stated intention before the CLRB was to call the combined classification "operating engineer" and to provide members of both former classifications with the required training to assume the duties of the new classification. During the first round of collective bargaining, the BLE strenuously opposed this change of designation, insisting that the combined classification remain "locomotive engineer". VIA finally conceded this point.

[5] On June 12, 1998, the BLE and VIA signed their first collective agreement for the new bargaining unit. Attached as Appendix A, was an agreement to implement VIA's NEPO initiative to transfer to the locomotive engineers all the operational work previously performed by the conductors, as well as the terms regarding the consequences of implementing such an initiative (the Crew Consist Adjustment Agreement - hereinafter the CCAA). The CCAA set the terms whereby the employment of those who would not qualify for the new classification was to be terminated at VIA. In the end, all locomotive engineers, with few exceptions, were trained for the new classification (thereby maintaining their employment), while only a few conductors managed to do so. The new CCAA commenced on July 1, 1998.

[6] Through a separate agreement negotiated between the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW), the non-operational or "on-train duties" of the conductors were transferred to another classification, the "onboard services employees". These positions were not offered to the conductors. This brought about the hiring of an additional 70 or so new employees in this bargaining unit. As this bargaining unit is not the subject of this decision, it will not be further mentioned in these reasons.

[7] A group of conductors took the view that the BLE had negotiated the CCAA to their detriment in favour of the existing group of locomotive engineers. This led them to file, through Mr. George Cairns, an unfair labour practice complaint pursuant to section 97(1) of the *Code* against the BLE, for having represented them in a manner that was "arbitrary, discriminatory and in bad faith in its representation of employees as result of the merger of two

bargaining units, in violation of section 37 of the *Code*." On October 22, 1999, The Board upheld the complaint and ordered the following remedies in *George Cairns et al.*, [1999] CIRB no. 35; and 2000 CLLC 220-12 (hereinafter referred to as Decision no. 35):

[130] Therefore the Board orders the following.

1. VIA and the BLE are to reopen the Crew Consist Adjustment Agreement on the following:

- a. the selection process for conductors and assistant conductors;
- b. seniority provisions as they affect conductors and assistant conductors who qualify as locomotive engineers;
- c. the application of the Special Agreement negotiated between UTU, VIA and CN;

and any other related issues as the parties see fit with a view to providing for the interests and needs of the group of conductors and assistant conductors. The parties are to conclude the negotiations of such amendments no later than December 15, 1999.

2. The BLE will design and hold an internal consultative process to determine these interests and needs and will hire an appropriate professional to assist the conductors and assistant conductors in this process.

3. The choice of such a professional is to be made in consultation with the conductors and assistant conductors.

4. The BLE is to bear, without the assessment of further union dues, the cost of the services of this professional.

5. The chosen professional will represent the conductors and assistant conductors for the purposes of the reopening and negotiation of the Crew Consist Adjustment Agreement, as provided above, and will share an equal voice with BLE representatives in coming to an agreement.

6. The BLE will assume, with respect to the instant proceedings, the fees of the complainants' legal counsel on a solicitor-client basis.

[131] The Board reserves its jurisdiction should the parties be unable to resolve matters concerning the remedies ordered by the Board.

[8] This was but the opening salvo of what became a flurry of legal proceedings.

[9] On November 15, 1999, VIA filed an application for reconsideration of the Board's decision.

[10] On November 19, 1999, VIA filed an application for judicial review of Decision no. 35 in the Federal Court of Appeal under section 28 of the *Federal Court Act*.

[11] On December 3, 1999, VIA filed an application for the Board to stay the application of its order issued as part of Decision no. 35, pending the decision on the application for reconsideration and based in part, on an arbitral award issued by Arbitrator Michel Picher, dated November 25, 1999, which concluded to the applicability of the Transfer Agreement to VIA employees unable to hold assignments at VIA. (This arbitration decision is reviewed further in these reasons, see para. [32] and ff.)

[12] As the conductors and the BLE were unable to reach an agreement on the choice of a professional to represent the conductors, the Board was required to issue an order on December 9, 1999, giving them until December 13, 1999 to reach an agreement on the choice of that professional, or else the Board would make that appointment, and extending to January 14, 2000 the deadline by which the parties were to come to an agreement on the ordered remedies. The BLE and the conductors came to agree on the appointment of Mr. Martin P. Gregotski.

[13] On January 12, 2000, a reconsideration panel of the Board dismissed VIA's application that Decision no. 35 be stayed: *VIA Rail Canada Inc.*, January 12, 2000 (CIRB LD 173).

[14] On January 17, 2000, the Federal Court of Appeal decided that Decision no. 35 should be stayed pending a judicial review hearing set for hearing no later than May 31, 2000: *International Brotherhood of Locomotive Engineers v. Cairns et al.* (2000), 263 N.R. 391.

[15] On May 5, 2000, a reconsideration panel of the Board upheld the original panel's decision on the basis of the evidence before it; however, it returned the matter to the original panel to hear additional evidence which the BLE and VIA claimed had not been brought to the original panel's attention: *George Cairns et al.*, [2000] CIRB no. 70.

[16] On June 6, 2000, the BLE asked the Board disqualify the original panel and appoint a new panel, on the basis of apprehension of bias since it had heard the original matter. This application was dismissed: *George Cairns et al.*, June 5, [2000] CIRB no. 86.

[17] On March 9, 2001, after hearing the further evidence presented by the BLE and VIA, the original panel found that this evidence did not support changing its original decision: *George Cairns et al.*, [2001] CIRB no. 111.

[18] On May 2, 2001, the Federal Court of Appeal dismissed the applications for judicial review filed by the BLE and VIA and lifted the interim stay: *VIA Rail Canada Inc. v. Cairns*, [2001] 4 F.C.A. 139.

[19] On June 5, 2001, following the Federal Court of Appeal's judgment remitting the matter to the Board to set a new time limit for the negotiation of amendments of the CCAA, the Board issued a further decision allowing CN and the UTU to become intervenors in the matter under certain conditions and setting the date of July 20, 2001 to complete the implementation of the Board's decision: *George Cairns et al.*, June 5, 2001 (CIRB LD 464).

[20] On July 26, 2001, at the joint request of the parties and after hearing their submissions, the Board issued an order appointing the Board's Executive Director to facilitate a resolution process. To the extent this process was unable to assist the parties, the order also provided that Arbitrator Picher be appointed to adjudicate the matter in the final instance through a mediation/arbitration process. The award of the arbitrator was to be issued no later than October 31, 2001 and provide for an implementation date of November 15, 2001 or such further date as he might determine.

[21] As the parties were unable to resolve the disputed issues through the facilitation process, the issues were referred to Arbitrator Picher as provided in the Board's order of July 25, 2001, in September 2001.

[22] On October 22, 2001, Arbitrator Picher wrote to the Board requesting an extension of his mandate for a further three months to January 31, 2002, on the basis that discussions had been sufficiently positive to merit an extension. It was his opinion that "the chances for a settlement, or alternatively a more constructive and acceptable award, will be greatly enhanced by such an extension of the time period."

[23] On October 25, 2001, the Board extended Arbitrator Picher's mandate on the basis of these representations.

[24] On December 6, 2001, VIA's application for leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada was dismissed: *VIA Rail Canada Inc. v. Cairns*, [2001] S.C.C.A. no. 338.

[25] On January 15, 2002, Arbitrator Picher requested a further extension to May 31, 2002, stating in part that a recent decision of the Quebec Superior Court could have some impact on the evolving positions of the parties and the terms of any potential settlement. The Board did not immediately grant this extension and solicited the parties' views as to a further extension.

[26] On February 5, 2002, by way of a conference call, the Board canvassed the opinion of all the parties, including the intervenors (VIA, CN and the UTU), as to the opportunity of giving a further extension to Arbitrator Picher to resolve outstanding issues. Since two days of mediation between VIA and CN had already been scheduled for February 6 and 7, 2002, the Board agreed to extend Arbitrator Picher's mandate to February 11, 2002. The scheduled mediation sessions did not provide a final resolution of the matter.

[27] On February 11, 2002, the Board issued a ruling that it was not extending Arbitrator Picher's mandate any further on the basis that it had not been convinced that a further delay would serve the best interest of the conductors. The Board stated that it was concerned that some two and one half years later, the BLE had yet to implement at least one of the Board's direct orders that were not part of Arbitrator Picher's mandate, namely the payment of the conductors' legal fees. The Board observed that the non-payment of legal fees as ordered in Decision no. 35, had become a detriment to the conductors' ability to continue to finance the mediation and any eventual arbitral proceedings before Arbitrator Picher. Consequently, the Board peremptorily set two sets of hearing dates: (a) to hear evidence and argument concerning legal expenses with respect to proceedings before the Board, lost wages, expenses and related issues concerning the arbitration mediation process as well as issues of enforcement; and (b) to hear evidence and argument on appropriate remedies with respect to all other outstanding remedies as well as issues of enforcement resulting from Decision no. 35.

[28] On March 4, 2002, the Board was required to issue another letter decision concerning a clarification requested by VIA about certain issues arising from the Board's ruling of February 11, 2002, and the responses received from other parties: *George Cairns et al.*, March 4, 2002 (CIRB LD 624). In this letter decision, the Board decided that (a) VIA was not an interested party to the dispute between the BLE and the conductors as to expenses and costs resulting from Decision no. 35; (b) it would hear the parties on the remedial orders; and (c) dismissed VIA's contention that it was not being provided with the right to a fair hearing because of the short time frames to review

the conductors' submissions, authorities and witness list before the hearing. The Board also stated that it would hear the entire matter and not rule on certain disputes between the BLE and the conductors in advance of obtaining VIA's submissions on remedies.

[29] On the same day, March 4, 2002, the Board simultaneously issued reasons for decision: *George Cairns et al.*, [2002] CIRB no. 163, dismissing an application by the BLE for the reconsideration of its February 11, 2002 ruling not to renew the mandate of Arbitrator Picher for a third time.

[30] On March 22, 2002, after hearing the parties on the extent of legal expenses and costs to the conductors to be ordered as a result of Decision no. 35, the Board issued an order to the BLE to compensate the conductors for their legal expenses and costs with respect to the original hearing and with respect to the applications for reconsideration, the rehearing of the matter and the quantum hearing.

II - Further Litigation of Matters With Respect to Decision No. 35

[31] Notwithstanding Decision no. 35, and parallel to the continuing matters before the Board just described, the BLE and VIA nonetheless carried on with arbitration proceedings concerning CCAA issues ordered to be renegotiated as per that decision.

[32] Firstly, an arbitration dealing with the flow-back rights of conductors under the Transfer Agreement from VIA to CN pursuant to the CCAA was under advisement before Arbitrator Picher at the time the Board's decision was rendered. The arbitration decision notes that written submissions in argument as well as reply and supplemental submissions continued to be forwarded to the arbitrator up to November 17, 1999, almost a month after Decision no. 35 was issued.

[33] Meanwhile, in light of the Board's findings, CN, the UTU, who were parties to these arbitration proceedings, and the conductors, asked the arbitrator, to either dismiss the dispute before him or to suspend the proceedings. The BLE and VIA urged the arbitrator to render his award. The award was issued on November 25, 1999 concluding that conductors at VIA had a right to return to the service of CN under the UTU Transfer Agreement.

The arbitrator also concluded that the Board's orders had no effect on his jurisdiction to decide the matter at issue, and that his proceedings were not rendered "nugatory" as a result of the Board's decision.

[34] On the very day this award was issued, VIA ordered the conductors entitled to return to CN to report to the CN operations centre within 72 hours, failing which, they risked forfeiting their chance to exercise their seniority with CN. The conductors were also told that VIA would be permanently cutting off salary protection by signing out of the letter of protection concluded as part of the CCAA.

[35] Within 72 hours, the conductors appeared on CN's doorstep. (Incidentally, for the three and half years that the conductors have been at CN, they have received salary protection as a result of a private agreement between the UTU, now the conductors' bargaining agent at CN until court matters are resolved.)

[36] In December 1999, CN brought a motion for judicial review of Arbitrator Picher's decision. On December 14, 2001, the Quebec Superior Court quashed the arbitrator's decision, with the effect that the conductors were to be returned to VIA. That decision is now under appeal before the Quebec Court of Appeal.

[37] Secondly, on February 25, 2000, in a related file, the UTU brought a complaint of unfair labour practice against VIA, alleging discriminatory conduct prejudicial to the careers of the conductors who had been transferred to CN as a result of the arbitrator's decision - as noted now once more represented by the UTU - more particularly because of VIA's lack of cooperation in imparting information to CN concerning its former conductors in order to allow for certain benefits at CN to occur. The UTU raised the BLE's continuing inaction towards VIA's former conductors. On August 23, 2001, the Board dismissed the UTU's application on the basis that any claims by the conductors against VIA had to be processed through the BLE as their legitimate bargaining agent at VIA: *VIA Rail Canada Inc.*, [2001] CIRB no. 127. However, the Board made some strong observations about the decidedly lack of cooperation between VIA and the UTU with respect to its former conductors and the fact that the parties "would be better served by addressing the consequences of [Decision no. 35] as quickly as possible".

[38] Thirdly, yet further arbitrations were commenced before Arbitrator Picher with regards to the very selection process ordered reopened by Decision no. 35. A policy grievance on the merit of the selection process under the

CCAA was the first to be adjudicated. This arbitration concluded on March 16, 2000, and an award issued on May 2, 2000. The arbitrator dismissed the policy grievance, concluding that the employer had the right to establish a selection process and that to limit training opportunities to correspond to the number of actual locomotive engineer vacancies in any given terminal. This award resulted in the denial of 21 grievances on the issue of the viability of a selection process. This award was followed by the further adjudication of 18 grievances concerning work habits assessment, 9 grievances concerning the mechanical aptitude test in relation to the selection process, 9 grievances related to the interview process and 2 grievances for other related reasons. Eleven grievances were settled, 3 were withdrawn. These awards were issued between April 2001 and January 2001, with apparently no deference given to the Board's orders.

[39] With this litigation as a background, not surprisingly the parties have been unable to this day to negotiate the amendments to the CCAA ordered in Decision no. 35 . The conductors now ask the Board to decide and impose appropriate remedies. This decision concerns the determination and application of these remedies.

PART II

III - Preliminary Objections Raised by VIA and the BLE to the Board's Jurisdiction on Remedial Issues

[40] As a preliminary objection to the Board's jurisdiction to now impose the remedies in this matter, VIA submitted, with the support of the BLE, that by amending any part of its original remedies, the Board would be illegally reconsidering its decision by setting aside its own decision. On this issue, the Board ruled orally at the hearing that it was not prepared to reconsider or enlarge its previous remedies as this would be contrary to the conclusions of the decision of the Federal Court of Appeal. It further ruled that the evidence to be presented on the matter of remedies should be consistent with its conclusions in *George Cairns et al. (35), supra*, and *George Cairns et al.*, June 5, 2001 (CIRB LD 464). The Board clarified that it would not hear any evidence on whether the CCAA was substandard or whether the overall conditions negotiated by the BLE on behalf of the conductors were in keeping with industry standards, as these parts of the original claim had been dismissed. It also stated that the only usefulness of industry standards would be to support a proposal or position taken with respect to the three areas the Board had ordered reopened: (1) the selection process; (2) seniority provision; and (3) the application of the Special

Agreement. However, the compensation of conductors during the training period, back pay as it relates to seniority and other compensation and training issues having incidental effects on the ordered remedies could legitimately be raised. The Board reserved its jurisdiction to separately address financial compensation not entirely resolved by the present proceedings.

[41] Expanding on the above oral ruling, the Board adds the following. VIA's suggestion that the Board should limit its jurisdiction to the strict confines of its original order without any consideration of the passage of time and intervening factors, would be to take an unnecessarily narrow and technical view of the *Code*. The *Code* was devised according to a tradition of labour legislation and policy designed to promote free collective bargaining and the constructive settlement of disputes, as is set out in the *Code's Preamble*. Accordingly, every section of *Part I* is interpreted by the Board with these objectives in mind. The liberal interpretation to be given to the *Code's* provisions is further reinforced by the correspondingly broad berth of remedial powers that were added to the *Code* under section 99 in 1999.

[42] In its reasons for dismissing the application for judicial review of Decision no. 35, the Federal Court of Appeal made two important statements. First, section 99(2) of the *Code* provides the Board with both the flexibility and the authority to create the innovative remedies, including remedies based on the principles of equity, which are needed to counteract breaches of the *Code* and to fulfil its purposes and objectives. Second, the court decided that the remedies contained in Decision no. 35 were appropriate in that the resulting order was wholly consistent with the *Code's* purpose of balancing the encouragement of free collective bargaining with the protection of employees who are represented by a bargaining agent.

[43] The Board does not apply the *Code's* provisions in a vacuum. It relies on constructive means to maintain effective industrial relations, based in part on its recognized expertise in dealing with labour relations matters (see subsection 10(5) of the *Code*). These means are not dictated by the *Code*, but have been left to the discretion of the Board. So long as its approach is "rationally connected to the union's breach and to its consequences" as stated by the Federal Court, the Board has a far-reaching discretion in fashioning an appropriate remedy. The Board's broad authority under section 99(2) of the *Code* is based on the principles articulated by the Supreme Court in its seminal decision of *Royal Oak Mines v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369. This decision also stands

for the proposition that the Board is to make its decisions based on the principles of equity. The notion of equity, consistent with the objectives of the *Code*, requires the Board to balance the encouragement of free collective bargaining with the protection of employees who are represented by a bargaining agent. It is in this sense that section 99(2) gives the Board both the flexibility and the authority to create the innovative remedies needed to counteract breaches of the *Code* and to fulfil its purposes and objectives as long as the remedies are rationally connected to the breaches: (*see Société Radio Canada v. Association des réalisateurs*, judgement rendered from the bench, A-32-02, February 25, 2003 (F.C.A.)).

[44] Consequently, to the extent that it dismissed certain parts of the original application, the Board has not revisited those issues or amended its original order. However, given the principles set out in the previous paragraph, the Board is of the view that it can adapt the remedies which it ordered in October 1999 to make them relevant to the present time, notwithstanding the fact that the Federal Court of Appeal considered those remedies to have been entirely appropriate. For the Board not to adapt its original order to reflect the passage of time would be to sidestep the balancing and remedial role intended by Parliament.

[45] This approach is also entirely consistent with the Board's powers under section 18 of the *Code*, which provides that:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

IV - The Memorandum of Agreement Proposed by VIA and the BLE

[46] As a further preliminary matter, the BLE asked the Board to consider a proposed MOU (referred to in para. [60] and ff.), dated April 2002 negotiated between the BLE, VIA and CN, which according to the BLE and VIA, resolves all outstanding issues between them, including what they submitted to be the outstanding issues concerning the claims of the conductors in relation to the Board ordered remedies. The proposed MOU is the product of an attempt at a mediated settlement before arbitrator Michel Picher.

[47] The proposed MOU provides as follows:

WHEREAS CN, VIA, and the UTU, on March 6th 1987, have signed a Special Agreement to which is annexed a Memorandum of Agreement with respect to the Inter-Company Transfer of employees between CN and VIA (hereinafter the "UTU Transfer Agreement"), in accordance with the provisions of Article G of the Special Agreement;

WHEREAS CN, VIA and the BLE, on June 4th, 1987, have signed a Special Agreement to which is annexed a Memorandum of Agreement with respect to the Inter-Company Transfer of employees between CN and VIA (hereinafter called the "BLE Transfer Agreement"), in accordance with the provisions of Article G of the Special Agreement;

WHEREAS as a result of the implementation of the New Era Passenger Operation (NEPO) initiative, disputes arose between the parties hereto resulting in extensive litigation before various Courts, Boards and Tribunals;

WHEREAS the parties wish to resolve a number of disputes relating to the NEPO initiative of VIA, the Cairns complaint before the Canadian Industrial Relations Board, the application of the BLE and the UTU Transfer Agreements, and the selection and seniority as VIA locomotive engineer of VIA conductors affected by NEPO;

WHEREAS, in order to arrive at a satisfactory settlement of all outstanding disputes as aforesaid resulting from the signature of the Crew Consist Adjustment Agreement (CCAA) by VIA and the BLE, the implementation of NEPO and the Orders of the CIRB in the Cairns matter, it will be necessary to amend in part the UTU Transfer Agreement and the BLE Transfer Agreement.

THEREFORE, it is agreed by the parties:

The above recitals form an integral part of this Agreement.

ISSUE 1 - SELECTION PROCESS

A) Eligibility

2. All former conductors, assistant conductors or yardmasters (hereinafter referred to as "Conductors") employed at VIA as of July 1st, 1998 who did not elect locomotive engineer training and returned to service at CN or did elect locomotive engineer training and were not provided an opportunity for selection and training at their terminal and returned to service at CN or who made no election and returned to service at CN may, within sixty (60) days, elect, in writing, to be placed on the priority lists (by terminal and by seniority district) for selection and training for a permanent vacancy as a locomotive engineer.

3. VIA and the BLE shall establish a single national selection committee to evaluate and select for locomotive training all former Conductors who elect under paragraph 2. The selection committee shall include two representatives of the BLE, one of whom shall be a former Conductor who has trained and subsequently qualified as a locomotive engineer and selected in agreement with the Cairns' group.

4. Any former Conductors who are disqualified, at any stage, from the process of selection and training, may grieve to expedited CROA arbitration their removal from the selection and training process. The CROA arbitrator may sustain their removal or may reinstate them to the process on such terms as he or she may deem appropriate.

B) Priority List

5. All eligible employees who were not given the opportunity to complete the selection process will be given the opportunity to complete the selection process.

6. All eligible employees who have already successfully completed the selection process, but for whom there was no locomotive engineer position available in their terminal and all those who will successfully complete it as provided in paragraph 5 above, will have their names placed on a "priority list" in their terminal.

7. Any permanent vacant position of locomotive engineer in a terminal will be offered by seniority order to the employees on the "priority list" for that terminal, subject to the successful completion of the training program; special provisions will apply to the terminals of Moncton and Senneterre as provided in paragraph 17(a).

8. The names of eligible employees in the terminal who do not accept in their seniority order for the vacant permanent position of locomotive engineer will be permanently struck from the "priority list".

9. The names of eligible employees in the terminal who accept in their seniority order the vacant permanent position of locomotive engineer, but who do not successfully complete the training program will be permanently struck from the "priority list".

10. If, in the terminal in which there is a permanent vacant position of locomotive engineer, no eligible employee accepts or no eligible employee successfully completes the training program, the position will be offered to NEPO group conductors on the seniority district priority list, by seniority, subject to the application of the relocation lump sum benefit of \$25,000, in the event of an effective relocation. Should a canvass of employees by seniority not identify a volunteer, the seniority district list shall next be canvassed by reverse order of seniority, and any employee who declines the opportunity shall be deemed to have forfeited any right to be canvassed for any future vacancies at other terminals in his or her seniority district. The application of this paragraph shall not affect the standing of any NEPO group conductor on his or her terminal priority list.

11. If, in the terminal in which there is a permanent vacant position of locomotive engineer, no eligible employee accepts or no eligible employee successfully completes the training program, the provisions of the BLE Transfer Agreement will apply.

ISSUE 2 - SENIORITY

12. Layoffs and recalls:

For the purpose of layoffs and recalls, the VIA conductors (**NEPO group**) working as locomotive engineers at VIA at the time of a layoff will be laid off and recalled in rateable proportion to their numbers then in service at VIA at their terminal at the time of the layoff, as compared with the number of locomotive engineers who are not VIA conductors (**non-NEPO group**). For example, if the complement of locomotive engineers at the time of a layoff at a terminal is ninety (90) **non-NEPO locomotive engineers** and thirty (30) **NEPO locomotive engineers**, the two groups will be laid off on the basis of a ration of 3.1, with the first three to be selected from the **non-NEPO group**, the next from the **NEPO group**, and so on. Recalls will be in reverse order of layoffs. **Layoffs and recalls by terminal shall be in an order which most closely maintains the then current ratio of the two groups at the terminal.** It is understood that terminal ratios will change overtime [sic], as **NEPO and non-NEPO locomotive engineers** leave the active workforce, by retirement or otherwise.

13. Material change:

In the event of any material change initiated by VIA, **NEPO group locomotive engineers** will have access to any benefits (severance packages, bridging, etc.,) **in rateable proportion** as specified in paragraph 12, but beginning with **non-NEPO locomotive engineers**.

14. Vacation bids:

For the purpose of bidding vacations all **NEPO locomotive engineers** shall bid on the basis of their CN conductors' seniority, and **all non-NEPO locomotive engineers** shall bid on the basis of their locomotive engineers' seniority, subject to any local agreements made with the concurrence of NEPO locomotive engineers at the location.

ISSUE 3 - TRANSFER AGREEMENT

15. **NEPO group locomotive engineers** laid off from VIA will have the right to exercise their Conductor's seniority at CN.

16. **NEPO group locomotive engineers** laid off from VIA will have a right of recall to locomotive engineer positions at VIA in accordance with the provisions of paragraph 12.

17. CN, VIA and the BLE therefore agree to amend the BLE Transfer Agreement as follows:

- (a) Notwithstanding the provisions of the BLE Transfer Agreement and more particularly the provisions of item 4 thereof, the bulletining provisions of the BLE Transfer Agreement shall be suspended at each terminal until all **NEPO group employees** at the terminal have been selected, trained and placed into vacancies as VIA locomotive engineers save at the terminals of Moncton and Senneterre. At the terminals of Moncton and Senneterre, the BLE Transfer Agreement shall be partially suspended to allow equal ongoing access to VIA locomotive engineer vacancies on a ratio of 1:1 as between **NEPO and non-NEPO candidates**, until all **eligible NEPO group employees** have been selected, trained and placed into vacancies as VIA locomotive engineers.
- (b) Notwithstanding the provisions of the BLE Transfer Agreement and more particularly the provisions of item 5 thereof, recalls from layoffs to locomotive engineer position in each terminal at VIA will be made in the reverse order of such layoffs **as between NEPO and non-NEPO employees**.

18. CN, VIA, the UTU and the BLE therefore agree to add the following to the UTU Transfer Agreement:

Any conductor to whom the UTU Transfer Agreement applies and to whom the BLE Transfer Agreement does not apply and who becomes unable, in the exercise of his seniority at VIA, to hold a regular assignment as a locomotive engineer in his terminal at VIA will be entitled to avail himself of the provisions of item 5 a (flowback to CN) and item 5 b (recall to VIA) of the UTU Transfer Agreement.

19. The parties agree to initiate whatever action may be required to obtain the consent of the Minister of Labour to the amendments of the UTU Transfer Agreement and BLE Transfer Agreement.

ISSUE 4 - SETTLEMENT OF REMAINING ISSUES

20. As an integral part of the Memorandum of Agreement, it is further agreed as follows:

- (a) VIA and the BLE shall withdraw without costs their appeal to the Tingley decision in the Quebec Court of Appeal;
- (b) CN will desist from the Tingley decision as per article 476 of the *Code of civil procedure of Quebec*;
- (c) VIA, the BLE and the UTU will desist from the Picher award and will file such desistment with the office of the Minister of Labour;
- (d) In consideration of such withdrawals and desistments, the parties agree and undertake that neither the Picher award nor the Tingley decision will be precedent setting or binding upon them for the purposes

of their rights and obligations under the UTU Transfer Agreement or the BLE Transfer Agreement in whole in part.

21. CN undertakes to continue the employment of VIA Conductors affected by NEPO, subject to the terms of the Memorandum of Agreement any applicable collective agreement.
22. The COMPLAINANTS are hereby approving, ratifying and signing through their authorized representatives, this Memorandum of Agreement to signify their concurrence and acceptance thereof as a final and binding settlement of all issues related to the Cairns matter (CIRB file 18938-C) and the implementation of the NEPO initiative.

AND THE PARTIES have signed this Memorandum of Agreement, at Toronto, this the day of April 2002.....

[48] The conductors submitted that the MOU was adverse to their interests because it had been negotiated without their participation and inadmissible on the basis that it was a document prepared in the course of settlement discussions. The Board admitted the proposal under reserve of its relevance and weight and, as will be seen, has considered it in reaching its decision.

[49] What the Board understands the BLE's and VIA's position to be is that the proposed MOU is the best position that these parties are prepared to put forward. Notably, the proposed MOU protects the employment of the BLE's traditional membership which is still employed at VIA as well as that of the CN locomotive engineers who have transferred to VIA since July 1, 1998 as a result of the continued application of the BLE Transfer Agreement. As CN is also a signatory to the proposed MOU, it also appears to settle the continuing dispute between VIA and CN with respect to the return of conductors from CN to VIA as evidenced in the undertakings under Issue 4 of the MOU. It resolves the issue of the reversal of Arbitrator Picher's arbitral award presently before the Quebec Court of Appeal. The Board has also been led to understand that there is a financial component to this transaction that the parties have maintained is not relevant to these proceedings and which has not been the subject of this inquiry.

PART III

V - Principles Applicable to the Board's Remedial Orders

[50] The issue to be determined at the outset is the principles that apply to the Board's remedial orders.

[51] The first principle comes from a statement of the Supreme Court in *Royal Oak Mines v. Canada (Labour Relations Board)*, *supra*, that there must be a relation between the breach and the consequence of the remedy:

The case of *National Bank*, *supra*, held that **there must be a relation between the breach, its consequences and the remedy**. However, **the necessity for a rational connection** is evident from the wording of s. 99(2) which requires that the remedy imposed by the Board be designed to counteract any consequence of the contravention or failure to comply found by the Board. In other words, **the Board must be concerned about remedying a specific breach of the Code, and in so doing there must be a relationship between the unfair practice which has occurred, its consequences to the bargaining process, and the remedy imposed**.

...

Section 99(2) provides that the Board is granted remedial authority for the purpose of ensuring the fulfilment of the objectives of the *Code*. Moreover, the remedies the Board imposes are meant to counteract the consequences of the parties' transgressions which are adverse to the fulfilment of those objectives. Therefore, an integral part of the Board's remedial duty is to strive to accomplish the *Code*'s purposes. This cannot mean that in all circumstances such emphasis must always be placed on one objective that all the other suffer. The Board is required to balance all the goals of the *Canada Labour Code* and fashion an order that, in the context of the particular situation presented gives a carefully balanced consideration to all the important factors outlined in the preamble.

(pages 410 and 412)

[52] The second principle, also expressed in *Royal Oak Mines*, *supra*, is that the Board is justified in exercising its experience and special skill to fashion a remedy:

Clearly, it can never be forgotten that free collective bargaining is a corner stone of the *Canada Labour Code* and of labour relations. As a general rule it should be permitted to function. Nonetheless, situations will arise when that principle can no longer be permitted to dominate a situation. Where the dispute has been bitter and lengthy; the parties intransigent and their positions intractable; when it has been found that one of the parties has not been bargaining in good faith and that this failure has frustrated the formation of a collective bargaining agreement; and where a community is suffering as a result of the strike **then a Board will be justified in exercising its experience and special skill to fashion a remedy. This will be true even if the consequence of the remedy is to put an end to free collective bargaining**. This follows in part because of its lack of good faith bargaining by a party which is frustrating the bargaining process and in part because of the other principles and factors the Board is required pursuant to the provision of the *Canada Labour Code*.

(pages 421 - 422)

[53] This principle was restated most recently in the matter of *Air Canada Pilots Association v. Air Line Pilots Association and Air Canada*, A-472-02, March 27, 2003, (F.C.A.):

[23] Second, **it well recognized by the Supreme Court of Canada that the Board is a specialized and expert tribunal better suited than the courts to weigh the interests of employers, employees, and the unions and to administer the provisions of the Code to the issues which come before it** (*Canadian Broadcasting Corp.* at para 53). **In turn this Court has recognized the expertise of the Board as a factor in deferring to Board decisions.** (see *Via Rail Canada Inc. v. Cairns*, [2001] 4 Q.C. 139 (Via Rail) at paras 30-32; *Tellus Advanced Communications v. Telecommunications Workers Union*, 2002 FCA 310; [2002] F.C.J. No. 1235 at paras 39-43).

[54] The third principle comes from the *Code* itself, setting forth the objective of the legislation and therefore the end result that the Board must keep in mind when determining redress. This statement of the law was most recently enunciated in *Air Canada Pilots Association, supra*, as follows:

[46] As noted earlier, **the Code's preamble states as its overarching objective, the promotion of cooperative and effective labour relations, constructive settlement of disputes, industrial stability, and a just and equitable distribution of resources to all Canadians. These objectives must guide the Board in its interpretation and application of all Code provisions**, including sections 35 and 18.1. **Implicit in the establishment of an expert tribunal such as the Board is the recognition by Parliament that the Board is the best judge of what would promote these legislative objectives.**

[55] The fourth principle is formulated in sections 99(1) and (2) of the *Code* which provides broad remedial powers where the Board has determined that a party has contravened or failed to comply with section 37, it may

99(1)(b) in respect of a contravention of section 37, require a trade union to take and carry on behalf of any employee affected by the contravention or **to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken** and carried on the employee's behalf or ought to have assisted the employee to take and carry on;

and may

99(2) For the purpose of ensuring the fulfilment of the objective of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, **require an employer or a trade union to do** or refrain from doing **any thing that it is equitable to require the employer or trade union to do** or refrain from doing **in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.**

[56] The fifth principle comes from the civil law of damages: *restitutio in integrum*: the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligations to take reasonable steps to mitigate his or her losses (see *Foreman, et al. v. Via Rail Canada*, (1998) 1 C.H.R.R. D/233). See as well *Société Radio Canada, supra*:

[7] Nous ne partageons pas cet avis. **Le Conseil** après avoir cité les propos du juge Cory dans l'affaire Royal Oak Mines Inc. c. Canada (Conseil des relations du travail) [1996] 1 R.C.S. 369 **a tenté de replacer la défenderesse dans la situation où elle aurait été si la violation ne s'était pas produite** (voir en particulier Royal Oak, paragraphe 90 tel que cité par le Conseil à la conclusion du au paragraphe 79 des motifs).

[8] La demanderesse prétend que là n'est pas l'effet de la mesure de redressement. Il lui incombait toutefois de démontrer en quoi la mesure conçue par le Conseil n'atteignait pas le but recherché. **À cet égard, il est utile de rappeler que la mesure n'a pas à être parfaite.....**

[57] Accordingly, the objective to be achieved is to remove the harmful effects of the union's failure to properly represent the conductors and to place them in the position they would have enjoyed had their rights under the *Code* not been breached.

[58] As the policy objectives of the *Code* are remedial in nature and not punitive, the mental state of the respondents is not relevant, nor is it a factor in mitigating its responsibility for damages. The *Code* provides at section 36 that a trade union certified as the bargaining agent for a bargaining unit has exclusive authority to bargain collectively on behalf of the employees of the bargaining unit. This exclusivity is tempered by section 37 which imposes on the bargaining agent the duty of fair representation of any and all employees in the bargaining unit. Hence, the statute contemplates the imposition of a liability on unions for all acts where it does not fairly represent its members. This liability is statutory and relief is available against the union who engages in discriminatory practices.

[59] In addition to the five principles set forth above, the Board also must consider in the instant matter, the passage of time and hence the situation as it has evolved since the time of the original decision. Conductors who have not become qualified locomotive engineers are no longer employed at VIA. Some are employed at CN. Some have accepted severance arrangements. Some locomotive engineers who used to work at CN now work at VIA. Many of the conductors have retired, and so on. In other words, the considerations that went into the Board's orders in October 1999 have changed due to the passage of time, not the least of which is the growth of VIA's business and the emergence of CN as a reluctant player in this matter. The passage of time has also considerably raised the financial stakes, and is a likely explanation as to why the parties have been unable to come to terms with the reopening of the CCAA as ordered by the Board. The passage of time has not only raised the financial stakes but taken its toll on the personal lives of the conductors.

[60] It is the Board's view that the delays in achieving the results now being ordered are a direct consequence of the breach of section 37 of the *Code* by the BLE. To limit a make whole order because of this factor would be to place the responsibility on the innocent parties - the conductors. Moreover, delays in litigation are not beyond the contemplation of parties to a dispute as to affect the amount of compensation and the period covered by an award.

[61] Additionally, the Board is mindful of conductors' loss of employment dignity which followed the implementation of the CCAA, the inordinate employment uncertainty to which they have been subject for the past five years as well as the profound effects on their families.

[62] The Board cannot imagine that Parliament wished such a result upon employees who become members of a union. The *Code* was designed to provide a speedy process at a non judicial level to resolve differences arising out of the union-employer relationship. The Board's processes are not meant to be a labour-management battleground, but a means of peacefully resolving differences to avoid permanently damaging the day-to day relationship which allows employers and unions to coexist and contribute to a more productive workforce. Parties are expected to collaborate with this process. To the extent that the parties are unable to resolve their differences, it is then left to the Board to intervene and reestablish an orderly process.

[63] It is also necessary to address VIA's responsibility concerning the within orders. In section 37 complaints, the employer's role is usually very limited, as it is not normally a party to the alleged discriminatory act of the union. However, it is entitled to intervene to make its arguments with respect to an issue where it has a direct interest or is affected by the cost of any remedy (see: *James H. Rousseau* (1995), 98 di 80; and CLLC 220-064 (CLRB no. 1127), *Cathy Miller* (1991), 84 di 122; (CLRB no. 854), and *Gordon Newell* (1987), 69 di 119; (CLRB no. 623)). Notably, in the instant matter, VIA took on an unprecedented active role in all the hearings, once the Board issued Decision no. 35 (see para. [9] to [28] above. It applied for and received intervenor status in each instance, that is, it was allowed to call evidence, cross-examine witnesses and make final submissions on an equal footing with the BLE and the conductors. It was given the opportunity to make full submissions as to the consequences of a Board decision on its operations. With respect to remedies, it has supported the position taken by the BLE and supports the provisions of a proposed Memorandum of Agreement (the proposed MOU - reproduced at para. [71]). While the employer's support of the position taken by the union is not singly determinative of the employer's liability, the

fact remains that the breach of section 37 as is the case here, which is related to matters determined by the bargaining process, is the outcome of an agreement between the BLE and VIA.

[64] Section 99(2) of the *Code* specifically provides that the Board may order an equitable remedy against the employer for the purpose of ensuring the fulfilment of the objectives of Part I of the *Code*:

99(2) **For the purpose of ensuring the fulfilment of the objective of this Part, the Board may**, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, **by order, require an employer** or a trade union **to do** or refrain from doing **any thing that it is equitable to require the employer** or trade union **to do** or refrain from doing **in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.**

[65] As well, when it judicially reviewed the Decision no. 35, the Federal Court of Appeal recognized that because the breach related to a negotiated agreement, an effect on the employer was an inevitable consequence (*VIA Rail Canada Inc.*, *supra*):

[60] It is true that the order will have an impact upon VIA, even though there was no finding of any contravention of the Code on its part. **However, this impact is a necessary and inevitable result of the Board's finding against the BLE. The employer was made a party to the original complaint, and permitted to make submissions before the Board, at least in part due to the recognition that its interests might be impacted by the any eventual order.**

[66] The issue of the joint responsibility of the union and the employer's respective obligations in cases of discrimination was judicially reviewed by the Supreme Court in the matter of *Renaud v. Central Okanagan School District 23* [1992] 2 S.C.R. 9. In *Renaud*, the tribunal upheld a complaint of religious discrimination against the employer based on section 8 of the *Human Rights Act* of British Columbia and against the union based on section 9 of the same legislation. In this case, the provisions of the collective agreement required an employee, a Seventh Day Adventist, to work a Friday evening shift as part of the regular schedule. The employee's religious beliefs prevented him from working from Friday evening at sunset until Saturday evening at sunset. The tribunal found that this condition of employment was adverse effect discrimination and that the union was instrumental in effecting it. Consequently, the employer and the union were held jointly liable; the employer for its failure to accommodate, that eventually led to the complainant's termination, and the union because it took the position that the employer's proposals were contrary to the collective agreement.

[67] The Supreme Court upheld the tribunal's decision of joint responsibility for the discriminatory acts. The context of the Supreme Court's pronouncements are the following:

The member designate determined that the condition of employment that the appellant work on Friday nights amounted, prima facie, to adverse effect discrimination. As the collective agreement set those terms of employment, both the school board and the union were liable for that discrimination. The member designate concluded that it was a BFOR that a custodian be present in schools but is not a BFOR that a custodian at the appellant's school work from 3 p.m. until 11:00 p.m. on Fridays. The preference of the union and school board that the school operate on this work schedule failed to satisfy the objective branch of the *Etobicoke* test as it was not related to the safety, efficiency, etc., of the job. Thus there was a duty on the union as well as on the school board to accommodate the appellant. She reached this conclusion on the basis that the duty to accommodate enunciated in *O'Malley* applied equally to a union and an employer.

Having found that the union was instrumental in bringing about the adverse effect discrimination, the member designate further found that the union was liable equally with the employer for the adverse effect discrimination. She further found that neither had discharged its duty to accommodate the religious beliefs of the complainant.

(pages 978 and 979)

The Supreme Court pursued its analysis as follows:

The union objected to the proposed accommodation on the basis that the integrity of the collective agreement would be compromised and not that any individual employee objected on the basis of interference with his or her right. In my opinion, the member designate came to the right conclusion with respect to this issue.

Union's Duty to Accommodate

The duty to accommodate developed as a means of limiting the liability of an employer who was found to have discriminated by the *bona fide* adoption of a work rule without any intention to discriminate. It enabled the employer to justify adverse effect discrimination and thus avoid absolute liability for consequences that were not intended. Section 8 of the Act, like many other human rights codes, prohibits discrimination against a person with respect to employment or any term or condition of employment without differentiating between direct and adverse effect discrimination. Both are prohibited. Moreover, any person who discriminates is subject to the sanctions which the Act provides. By definition (s. 1) a union is a person. Accordingly, a union which causes or contributes to the discriminatory effect incurs liability. In order to avoid imposing absolute liability, a union must have the same right as an employer to justify the discrimination. In order to do so it must discharge its duty to accommodate.

The respondent union does not contest that it had a duty to accommodate but asserts that the limitations on that duty were not properly applied by the member designate. It submits that the focus must be on interference with the rights of employees rather than on interference with the union's business. It further submits, and is supported in this regard by the Canadian Labour Congress (CLC), that a union cannot be required to adopt measures which conflict with the collective agreement until the employer has exhausted reasonable accommodations that do not affect the collective rights of employees.

These submissions raise for determination the extent of a union's obligation to accommodate and how the discharge of that duty is to be reconciled and harmonized with the employer's duty. These are matters that have not been previously considered by this Court.

As I have previously observed, the duty to accommodate only arises if a union is a party to discrimination. It may become a party in two ways.

First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. It has to be assumed that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees....

Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. In this situation it will be known that some condition of employment is operating in a manner that discriminates on religious grounds against an employee and the employer is seeking to remove or alleviate the discriminatory effect. If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination. In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination. It cannot behave as if it were a bystander asserting that the employee's plight is strictly a matter for the employer to solve...

(pages 989 to 991)

[68] The Board is of the view that the principles in *Renaud* are equally useful in interpreting the remedies available under the *Code*. In *Renaud*, the question at issue was the contributory effect of a collective agreement and the actions of a certified trade union with respect to discriminatory practices by the employer. The question posed to the Supreme Court was whether a trade union could be liable for discrimination if it refused to relax the provisions of a collective agreement and contributed to blocking the employer's attempt to accommodate the employee. Similarly in the within matter, albeit *a contrario*, the issue raised is whether an employer can be held responsible for the consequences of a breach of the duty of fair representation if fair representation has been breached as a result of the provisions of the collective agreement.

[69] It is common knowledge that human rights legislation and labour codes have in common the avoidance of discriminatory acts. In the case of human rights legislation, the rights protected pursuant to the legislation are broader and go beyond the work place, while the rights protected under labour codes are specifically related to unfair labour practices in the work place. Nonetheless, the policy objectives of curing the workplace of discriminatory acts is similar and it is not unusual for the *Code* to have legislated a shared responsibility, as provided in section 99(2). In *Renaud*, the work schedule, which was part of the collective agreement was the basis of the discriminatory practice. The complainant and the employer had been able to find a practical accommodation by creating a Sunday to Thursday shift without the offending Friday to Saturday evening. However this shift was an exception to the

collective agreement and required the union's consent. The union demanded that the employer rescind this shift under the threat of filing a policy grievance. Essentially, the tribunal found that the union's withholding of its consent contributed to the discrimination and thus it was equally accountable for the breach.

[70] In the within matter, VIA negotiated and agreed to a selection process which affected training opportunities and the end tailing of the conductors' seniority. It also accepted the conditions under which the BLE Transfer Agreement was to be temporarily suspended. Its agreement on these issues contributed in setting up the discriminatory practices against the conductors. To quote *Renaud*, it "cannot [now] behave as if it were a bystander asserting that the [union's] plight is strictly a matter for the [union] to solve".

[71] While the BLE bears the responsibility towards its membership for the breach to the *Code*, both the BLE and VIA must share in the consequences of the Board's decision since both parties were instrumental in producing the effects of the CCAA, though perhaps not to the same degree. In the circumstances of this case, the imposition of financial consequences on VIA is a necessary conclusion to give effect to the Board's orders where the object is to resolve the discriminatory effects of the CCAA.

[72] As noted earlier in these reasons, (at para. [19], [26], [32] to [36]), the within orders will necessarily have an impact on VIA employees now employed at CN. The transfer of VIA conductors to CN had not yet occurred when the Board issued Decision no. 35, but was created by the subsequent award of arbitrator Picher. In requesting intervenor status on the issue of remedies, CN argued that the Board had no authority to impose a remedy on CN. The Board does not disagree with this position, and has not directed any orders against CN under section 99(2) of the *Code*. However, the Board's remedial order cannot avoid having ramifications at CN because VIA conductors are now employed at CN.

VI - Balancing the Remedial Issues

[73] In the reasons that follow, the Board's analysis and conclusions have been conducted from two different viewpoints, in order to balance the application of the principles incident upon remedial orders as reviewed in this Part. The first viewpoint is to be found in Part IV, where the Board has considered the various aspects of a make

whole order, that is, the remedies that would be required to put the conductors in the position they would have enjoyed had the discriminatory acts of the BLE not occurred.

[74] As a second viewpoint, the Board then considered the practical aspect of implementing these remedies, taking into account the passage of time. On the grounds indicated in Part V, the Board finds that it is not practicable to order the full implementation of the remedies to which the conductors are rightfully entitled, but that a more nuanced approach should be adopted.

[75] The outcome of this approach is that the considerations in fashioning a remedy have been analyzed first, followed by the remedial order which takes into the considerations of the first analysis. Consequently, the enforceable remedial order is in part, a monetary compensation for that part of the conductor workforce which should have had access to employment at VIA since July 1, 1998, and in part, a direction to VIA concerning the integration the remaining conductors into VIA's workforce. In making submissions as to the amount of monetary compensation, the parties are to take into account the monetary value of the standards contemplated by the Board in its first analysis. Finally the issue of apportioning of the cost of the Board's remedial order is addressed.

PART IV

VII - Redress with Respect to the Selection and Training Process

[76] For greater clarity, and before reviewing the details of the parties' proposals on this issue, there are two points which need to be made in order to better understand the Board's conclusions.

[77] To have access to locomotive engineer positions within VIA, the conductors must receive training. The CCAA set down a condition whereby, conductors who elected to become locomotive engineers had to pass a three-step process determined by VIA. Such a selection process was not part of the UTU collective agreement which applied to the conductors before their classification was merged with the BLE bargaining unit. The Board understands that the selection process was imported by the BLE from the UTU collective agreement at CN. At CN, because there are still two distinct running trades classifications for locomotive engineers and conductors, conductors who want

to train as locomotive engineers must pass a selection process. The unrefuted evidence was that most if not all conductors at CN who apply for training as locomotive engineers pass the selection process without much difficulty. VIA conductors made the point that the requirements at VIA should not be so high as to disqualify most conductors who have expressed an interest to be trained. The Board understands that all new applicants for the running trades at CN must now establish their aptitude to become a locomotive engineer at the time of their hiring.

[78] As well, the selection process under the CCAA is intertwined with the issue of seniority rank which will apply to conductors who elect to be trained and are selected. Deciding the issue of selection for training and seniority ranking without addressing employment opportunities does not really address the ultimate issue of providing balanced employment within a merged classification with almost equally senior employees between the two groups.

[79] Therefore, the analysis of employment opportunities upon successful completion of training is dealt with under the selection process. The Board's conclusions concerning this issue are tied to its conclusions on second issue of seniority ranking between locomotive engineers in place at VIA in July 1, 1998 and conductors who become qualified locomotive engineers after that date.

a) Position of the Conductors

[80] The conductors disagree with the provisions of the proposed MOU and advanced their own solutions with respect to the selection process.

[81] First of all, the conductors argued that there should be a new election process for training but no selection process. Their justification for no selection process is that the selection process under the CCAA was not fairly applied as compared with the results of CN conductors who have undergone a similar selection process. They submitted that 50% of the conductors who grieved the selection process under the CCAA had been successful in being reintegrated into that process. These results notwithstanding, they submitted that the arbitrator's decisions were of no precedential value as they went against the Board's order reopening the selection process.

[82] If selected for training, the conductors submitted that they should be paid expenses and earnings. They submitted that this should be in accordance with their actual loss of earnings or their maintenance of earnings, in keeping with the Mackenzie Award (an earlier arbitral award setting the terms of the UTU collective agreement).

[83] The conductors submitted that medically restricted employees who could not qualify because of the change in duties, be accommodated at their home terminal.

[84] Furthermore, conductors who qualify as locomotive engineers with a right of return to CN should be entitled to return to CN, should they be unable to maintain a position as a locomotive engineer at VIA.

[85] Conductors argued that if they qualify as locomotive engineers they should be entitled to any loss of earnings and maintenance of earnings from the time of the implementation of the CCAA and the date of qualification as a locomotive engineer.

b) The Proposed MOU

[86] In reviewing the proposals as set forth in the proposed MOU and those advocated by the conductors, the Board is of the view that it must temper both proposals.

[87] The MOU does not provide significant redress to the conductors for the following reasons. First, the employment prospects of conductors at VIA are limited to being placed on priority lists and awaiting future permanent vacancies before they can be trained. Predication on future vacancies means that the BLE's traditional membership at VIA remains undisturbed and that it continues to enjoy all the rights and privileges created under the CCAA. In the same manner CN locomotive engineers who have transferred from CN since July 1, 1998 and are also represented by the BLE, continue in their existing positions without interference from the conductors awaiting positions.

[88] For the conductors to accede to locomotive engineer training opportunities at VIA, one of two conditions must arise: (a) permanent vacancies created by attrition (retirements, voluntary departures or terminations) or, (b) new

positions created because of business growth at VIA. Evidence before the Board is that attrition will continue at its normal rate (i.e. a few vacancies a year throughout Canada) and VIA does not foresee any substantial business growth at this time. Therefore, absent any Board intervention, future opportunities to be selected and trained appear to be few. It would likely take several years for positions to materialize and conductors to significantly occupy the ranks of locomotive engineers or have some employment parity with the BLE's traditional membership.

[89] Second, the priority lists are limited to the former terminals and seniority districts of the conductors without consideration to securing maximum levels of employment for the conductors. In other words, the proposed MOU favours the *status quo*.

[90] Third, the proposed MOU now makes an exception to training for at the Moncton and Senneterre terminals where none existed in the CCAA. Other than protect the existing employment of CN locomotive engineers who have transferred to VIA, no significant reason for this exception was advanced.

[91] Fourth, the relocation lump sum benefit is applicable only to conductors within the seniority district. The sum of \$25,000 is the company standard to compensate for relocation initiatives. However, that it should apply only within the seniority district serves to restrict employment opportunities as between districts.

[92] Fifth, while it is allegedly suspended, the BLE Transfer Agreement (i.e. CN locomotive engineers having flow back rights at VIA) nonetheless continues to apply in circumstances where there are no conductors on the district priority list prepared to immediately fill a permanent vacancy. This provision of the MOU must be read as a limiting factor on the conductors' ability to resume employment at VIA.

c) Analysis of the Selection and Training Process

[93] The Board understands that mobility has traditionally been restricted within a seniority district. However, given the unusual effects of VIA's NEPO initiative, the Board considers that the general principle that conductors should be afforded every opportunity to be selected and trained should be foremost. In practice, this means allowing

conductors to be considered for other seniority districts where employment opportunities have been created since July 1, 1998, if they are unable to maintain employment in their own seniority district.

[94] With respect to whether certain standards should apply to the selection process in order to gain access to training, the Board was persuaded by the employer's arguments. Locomotive engineer training requires some three weeks of intensive classroom training and some six months of hands-on training under the supervision of another locomotive engineer. This is to satisfy passenger safety concerns that are key to the employer's operations and to ensure that locomotive engineers are able to operate complex mechanical and electronic equipment. The training of a locomotive engineer is, therefore, a costly proposition.

[95] While conductors have undergone railway rules training throughout their career, and have assisted locomotive engineers in the performance of their duties, this is not sufficient to immediately qualify them for training. Therefore, the Board is of the view that there should be a selection process.

[96] However, the Board considers that the three-step process established by the CCAA is inappropriate. In this regard, the Board was persuaded by the arbitration results that returned some 50% of eligible conductors back into the selection process. As the conductors are not new, off the street applicants, some consideration must be given to their long service at VIA. VIA employees, are not allowed to accumulate extensive discipline records because the point system negotiated as part of the collective agreement allows for the termination of employees with undesirable discipline records. Thus conductors who are still employed at VIA have maintained a track record over time as suitable employees.

[97] As conductors are not entry level positions, these employees have demonstrated their capacity to learn beyond the rudiments of railway operations. Accordingly, the two steps in the selection process dealing with work habits assessment (employment and discipline record) and the learning aptitude assessment are not an appropriate basis for excluding the conductors from training. The only relevant assessment criteria remaining is, therefore, the mechanical aptitude test.

[98] In light of the employer's evidence that the passing mark for the mechanical aptitude test had to be lowered to allow more conductors to qualify and given that this assessment is now the only remaining criteria for access to training, a 60% passing mark is deemed appropriate.

[99] The Board agrees with the BLE that there should be a single national committee to evaluate conductors on the basis of this test and set the standards for the pass mark. To be fair, the standards must be set in advance of any interviews taking place. To adequately represent the interests of all the parties, the committee should be composed of an employer representative, a locomotive engineer representative designated by the BLE and a now trained locomotive engineer from the conductors who are the complainants in this matter, all having an equal voice in the selection process.

[100] In view of the fact that the conductors are being given another chance at being selected for training and to achieve some finality on this issue, the Board is of the view that protracted arbitration proceedings are not justified. Given the litigation that followed the Board's original orders to reopen the selection and training process, the readjudication of the same or similar issues serves no useful purpose. Therefore, the single national committee's evaluation of the Bennett Mechanical Comprehension Test (presented as Exhibit 75) results shall be final, except for obvious errors in the administration and marking of the test.

[101] It also stands to reason that the conductors should receive a fair compensation during their training period and that their expenses to undergo the selection process and training be in accordance with existing company policies.

[102] The Board has also given consideration to the situation of the three medically restricted conductors who may be unable to undergo training. While it was perhaps possible to accommodate them by means of lighter duties within the train, it may not be possible to accommodate them with respect to locomotive engineer duties. However, since the medically restricted conductors were part of VIA's normal workforce on July 1, 1998, they should have been accommodated and not simply left to fare for themselves at CN. They should, therefore, be compensated accordingly.

[103] With respect to VIA conductors who elected to retire as a first choice pursuant to the terms of the CCAA and who in fact retired, no convincing evidence was presented to the Board that these employees should see their election reversed. The Board considers that these employees were never interested in training opportunities at VIA and that their decision to retire should be considered final. Those for whom retirement at VIA under the terms of the CCAA was not a first choice, they should be allowed to review their decision after consideration of financial and any other consequences of returning to the active workforce at VIA.

VIII - Redress with Respect to Seniority Provisions

a) Position of the Conductors

[104] The conductors clearly disagree with the provisions of the proposed MOU. The conductors submitted that they should be entitled to occupy up to 50% of the locomotive engineers assignments at each location, that a number of assignments be protected (or "red-circled") on a terminal-by-terminal basis and that these protected positions remain frozen for lay-off purposes until the last former conductor retires or leaves the employment of VIA. They asked that red-circled employees be able to move to other locations where protected positions exist. The complainants provided the Board with examples of a number of such agreements in the railway industry, notably, the Canada and Southern Railway, N.S. & T. Railway, the Cornwall Street Railway, the "Belt Pack Agreement".

[105] The conductors also proposed that, alternatively, some form of dovetailing be implemented, such as allowing conductors to use their CN service date or having "pure VIA" employees (i.e. employees whose only employment service has been with VIA since it became a Crown Corporation) use their continuous service date, regardless of the department in which they worked. As well, they requested the amount of \$25,000 for each former conductor affected by the CCAA and that those who retired as a result of the CCAA be entitled to better pensions. They submitted that conductors should be offered early retirement incentives in lieu of taking locomotive engineer training.

b) The Proposed MOU

[106] The Board notes with some dismay that the proposed MOU does not modify the seniority ranking, contrary to the Board's order to reopen this aspect of the CCAA. The MOU merely provides for a sharing of employment losses, should there be cut backs due to layoffs, recalls, material changes (equivalent to technological change in other industries). The proposed MOU presumes that conductors will automatically go to the bottom of the seniority list at the end of their training. To avoid the conductors having to assume all employment losses because of their inferior rank on the seniority list, layoffs and recalls are to be shared between the more senior locomotive engineers and the conductors in a rateable proportion to the number of positions occupied in a given terminal.

[107] The example given in the proposed MOU to illustrate its application is where there are 120 locomotive engineers, 90 so-called non-NEPO locomotive engineers (i.e. the BLE's traditional membership) and 30 so-called NEPO locomotive engineers (the conductors). Thus in the case of layoffs, the first three persons to be laid off would be the non-NEPO locomotive engineers while the fourth person would be a former conductor.

[108] This may appear fair at first blush, however, the evidence concerning each terminal only supports this solution for the three largest of VIA's 22 terminals, where there have been more significant numbers of conductors already trained as locomotive engineers: Quebec (District 2), Montreal (District 3), Toronto South (District 4). The largesse that non NEPO locomotive engineers be laid off first has less damaging consequences because locomotive engineers (except for five VIA direct hires) can maintain employment by transferring back to CN as locomotive engineers. Conductors trained as part of VIA's complement do not have the same flowback rights to CN as locomotive engineers once they are laid off, as they are not covered by the Transfer Agreements because of the 1985 cut-off date.

[109] As may be seen from the statistics attached as Appendix A, collated from Exhibit 70, most terminals are much smaller, such that the proposed ratio cannot be uniformly applied to all terminals. The proportion of conductors is different in each terminal and no generalized formula is easily applied. Thus, a ratio of layoffs does not afford much employment security to the conductors.

[110] Another observation is that because opportunities for training of the conductors under the proposed MOU are conditioned by attrition, the proportion of non-NEPO and NEPO locomotive engineers will likely continue for some time. The attrition rate will likely be slower than normal because many retirements were forced as a result of the CCAA, with the remaining employees having several years of employment left before retirement. The Board therefore questions how conductors still on priority waiting lists are given added opportunities by this proposal.

[111] The other difficulty that arises under the proposed MOU is that the conductors who become qualified locomotive engineers will remain at the bottom of the seniority list for the rest of their career. This situation arises because when CN locomotive engineers exercise their transfer rights to VIA, the seniority conditions of the Transfer Agreement (June 1985 or previous) that allows them to transfer will always give them a seniority advantage over the newly trained conductors. The CCAA establishes the seniority date of conductors who become qualified locomotive as a universal October 31, 1997. Thus conductors' seniority will only ever exceed future VIA direct hires, a situation which is not in the foreseeable future.

c) Analysis of the Seniority Provisions

[112] It is important to restate that conductors are all long service employees, and in some cases, have more railway experience than existing locomotive engineers. Most have come up through the ranks of the running trades and have occupied more than one position within the rail industry. In the course of their employment, they have had to learn and be tested on the many operating rules which apply to the running of trains. As stated earlier, this does not mean that they should be integrated as locomotive engineers without having passed the required training, but once qualified, there is no reason for them to be isolated in a separate group for the rest of their career.

[113] The proposed MOU does little more than maintain in perpetuity a distinction between locomotive engineers employed by VIA prior to the NEPO initiative and marginalise the status of conductors who have become or will become qualified after implementation of the NEPO initiative (see in particular the sections of the MOU above which have been emphasized). This distinction maintains the very distinction the Board found to be a breach of section 37, in Decision no. 35:

[114] In this matter, the Board notes that the BLE gave little or no weight to the normal and natural consequence of the Board's decision to merge the two bargaining units. **In fact, the BLE continued to maintain the distinction between the two groups of employees, the haves and the have nots, where there should have been only one. In this respect, the union did not fulfill its institutional role of bargaining agent.**

[115] The second test examines whether the union appropriately protected employee rights within the collective bargaining regime. As the Crew Consist Adjustment Agreement forms part of the collective agreement on behalf of **all** the employees in the bargaining unit, the conductors and assistant conductors were entitled to the same level of representation as the locomotive engineers. The Board specifically recognized this fact when it decided, based **on equal access to the newly created positions by both groups of affected employees**, that a single new bargaining unit was appropriate.

(pages 38-39; and 143,145; emphasis added)

[114] The reconsideration panel of the Board also emphasized this point as follows, in *George Cairns et al. (70)*, *supra*:

[17] It appears to the present reconsideration panel in considering the sorry history of this matter that there is a fundamental difference between what the Board was led by the employer to expect in the consolidation process and what in the end occurred. **There was no real attempt to consolidate the two classifications. The result of what was done, based on the evidence presented to date, was to squeeze out the conductors after persuading the Board that their interests would be respected in the negotiations that would necessarily occur as a part of the consolidation process.**

[18] Unfortunately, as the employer and the BLE must clearly have been aware, with the certification of the BLE on October 31, 1997 as sole bargaining agent, the avenues available to the UTU and the conductors to challenge the subsequent steps of the BLE and the employer were limited. Nonetheless, the employer and the BLE now argue that the negotiation process anticipated by the CLRB should not be examined, because the scope of inquiry under section 37 does not permit this to be done.

[19] The approach of the employer and of the BLE of relying on the inaccessibility of the negotiation process to examination through a section 37 complaint, to seek to exclude Board scrutiny of the arrangement arrived at is, in such circumstances, disingenuous, to state the issue as favourably to them as possible.

[20] To take this approach in the circumstances would, in addition to requiring this reconsideration panel to display singular naiveté, require it to ignore the provisions of section 114 of the *Code*, which indicates:

"114. No proceeding under this Part is invalid by reason only of a defect in form or a technical irregularity."

[21] In the circumstances, it simply is not appropriate in the view of the reconsideration panel to suggest that since the form of the application leading to the decision was a section 37 complaint, the conduct of the negotiations should be immune from Board scrutiny. At both the time of the consolidation and the time of the first violation of section 50 of the *Code* by the employer and its initial, unilateral and illegal attempt to discharge the conductors, the CLRB noted that effective negotiations would be required. Even if in other circumstances the Board should take a limited view of its jurisdiction under section 37 to consider the conduct of negotiations, in the present circumstances such a limited view would require clear statutory language. In the view of the present reconsideration panel, the language of section 37 is not so restrictive. Additionally, as will be considered below, the view of the CLRB respecting its power to enquire concerning negotiations was not so restrictive as has been suggested. However, before considering this in detail, there are certain further comments that should be made.

[22] To consider the real substance of the matter under review, in the opinion of the initial panel, the anticipated negotiations to address the situation of the conductors did not occur because the representatives of the conductors were not appropriately informed, involved and consulted in the course of the negotiations that took place. **The panel also found that rather than a real consolidation, two group structures were maintained in the consolidated unit, and that this situation was not adequately addressed in the ultimate "Crew Consist Adjustment Agreement" Appendix to the collective agreement that was concluded. The job security and seniority interests of the conductors and assistant conductors were not protected and the benefits of the conductors and assistant conductors, in the words of the original panel "are for the most part directed at terminating their employment, pale in comparison to the generous benefits obtained for the locomotive engineers."** (pages 40; and 143,146)

[23] The panel in the decision under review found that there had been "an improper collaboration between the employer and the respondent union [BLE] to achieve a desired outcome for both parties at the expense of the rights of the minority and most affected group of employees." (pages 42; and 143,148)

[24] It is in this context that the concerns that are stated as supporting the present request for reconsideration must be examined.

(pages 11-13; emphasis added)

[115] Consequently, the Board finds that the proposals suggested by both parties do not go far enough in integrating the seniority of the merged classifications. It is not because the combined classification continues to be called "locomotive engineer" as opposed to "operating engineer" that the two classifications have not been merged. It is also not at issue that locomotive engineers have been trained and are doing the operational component of the former conductor's work, just as the conductors who have become locomotive engineers have been fully trained to do the work of the locomotive engineer classification. On this basis, there is no justification in making any distinction between so-called NEPO and non-NEPO locomotive engineers.

[116] In a recent matter, the Federal Court of Appeal had to consider the Board's authority with respect to a seniority list integration under the *Code* in the case of the Air Canada pilots. While the seniority integration was in the context of a combined section 35 and 18.1 review, the Federal Court of Appeal made some all encompassing statements about the *Code*, including the nature of its remedial nature in protecting bargained rights and the position it took with respect to Decision no. 35:

[45] In my view the Board's decision is not patently unreasonable. A seniority list integration review conducted under the Code must be consistent with the principles and objectives underlying the Code, the specific principles underlying sections 35 and 18.1, as well as a recognition of the importance of seniority in the context of Canadian labour relations.

[46] As noted earlier, the Code's preamble states as its overarching objective, the promotion of cooperative and effective labour relations, constructive settlement of disputes, industrial stability, and a just and equitable distribution of resources to all Canadians. These objectives must guide the Board in its interpretation and application of all Code provisions,

including sections 35 and 18.1. Implicit in the establishment of an expert tribunal such as the Board is the recognition by Parliament that the Board is the best judge of what would promote these legislative objectives.

[47] In 1995, the Minister of Labour established the Sims Task Force (*Seeking a Balance: Review of Part I of the Canada Labour Code* (1995 (*Sims*)), which was comprised of labour relations experts, and who were to conduct an independent review and recommend legislative changes to Part I of the Code. Some of the changes recommended by the task force were implemented in section 18.1. Before 18.1 was enacted, the Board lacked the express power to resolve seniority integration issues arising from a corporate merger or the merger of bargaining units. *Sims* found this lack of express authority troublesome because it left the problem of integrating work forces and collective agreements to the employer and the union alone. *Sims* found that in a merged bargaining unit, significant conflicts do arise among formerly separate groups of employees and addressing this conflict by reopening collective agreement negotiations was an ineffective way to resolve these issues (*Sims* at 70,72). Thus *Sims* recommended that the Code be amended to grant the Board broad authority to make any consequential orders necessary to re-establish effective collective bargaining and contract administration following a bargaining unit review.

[48] Arising from that recommendation, section 18.1 was enacted by Parliament so as to allow the parties themselves to first attempt to reach an agreement on issues arising from a single employer declaration.

[49] In my view, the Board's decision in this application is entirely consistent with its own jurisprudence. (See *Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 at 162, *Re Air Canada* (August 3, 2000), C.I.R.B. Decision No. 79; [2000] C.I.R.B. No. 33, *Re Grasky*, [2001] C.I.R.B.D. No. 48, and *Re Cairns*, [1999] C.I.R.B.D. No. 35, upheld by this Court in *Via Rail*). The Board determined that sections 35 and 18.1 should be read together and that their purpose is remedial in terms of protecting bargained rights and promoting sound labour relations. The Board found that a "winner take all" approach that gives one group of employees a premium and disadvantages others is not consistent with the intent of section 18.1. It recognizes that negotiated collective agreement rights must be protected and preserved to the extent possible and must only be amended if this is necessary in all of the circumstances. In applying these principles, the Board's decision is not patently unreasonable.

[50] For reasons which I have already articulated, the Board's selection of October 17, 2000, as the appropriate date for seniority list integration was a matter the Board could decide as part of its review powers and as contemplated by paragraph 3 (k) of the Protocol. In selecting this date, the Board was expressly conscious of the need to integrate seniority in a manner that was consistent with the Code's regime for conducting a bargaining unit review and consistent with the existing labour relations realities. At paragraph 158 of the Board's reasons, the Board noted:

The process of merging bargaining units pursuant to sections 35 and 18.1 of the *Code*, must reflect the reality that the *Code* requires under section 35, that there be an application, consideration by the Board of at least the representations of affected parties, a declaration by the Board, and then, under section 18.1, an opportunity by the parties to come to agreement respecting the matters in issue, and finally, a determination by the Board. These processes must reflect their statutory basis and the industrial relations realities, facts and circumstances that actually exist.

[51] The Board's selection of October 17, 2000, as the date for seniority list integration was not patently unreasonable.

[117] The Board is of the view that even though the Federal Court of Appeal's decision is directed at sections of the *Code* which were not in effect at the time the CLRB decided to merge the classifications of locomotive engineers and conductors, the principles are nonetheless relevant to the situation at hand. In the *Air Canada* matter, *supra*, the original panel of the Board was called upon to reconsider the decision of an arbitrator concerning the integration of pilot seniority lists (within Air Canada as a result of the merger with Canadian Airlines). In reversing his

decision, the Board held that the arbitrator had not given proper consideration to the remedial approach to seniority list integration directed by the *Code* and had given improper emphasis to economic considerations. The Board also held that the arbitrator had adopted an approach to the seniority list that was deliberately designed to premium or advantage the Air Canada pilots, contrary to the intention of the *Code*. (Notably in Decision no. 35, the Board referred to the inequitable opportunities created between the "haves and the have nots" - para. [114].) The Federal Court of Appeal, not surprisingly, also rebuked a "winner takes all" approach to seniority lists.

[118] The BLE did not advance any compelling argument as to while its traditional membership should continue to receive an advantage over the conductors other than they became qualified as locomotive engineers before the conductors did. While there might be a certain logic to this position, the provisions of the collective agreement contradict this view, since the long standing collective agreement between the BLE and VIA puts all locomotive engineers on an equal footing. Once qualified, all locomotive engineers receive the same basic rate of pay and benefits. Greater earnings are the result of overtime assignments and other premium assignments, but not based on years of experience as might be the case in other collective agreements. The distinction between the non-NEPO locomotive engineers and the NEPO locomotive engineers (the conductors) is a creation of the last round of bargaining.

[119] Furthermore, as part of these hearings, the undersigned was given the opportunity to observe the work of two locomotive engineers within the locomotive cab at the head of the train during a trip between Toronto and Kingston. For this site visit, one of the locomotive engineers selected was a former conductor trained after the implementation of the NEPO initiative and the other was a locomotive engineer with lengthy locomotive engineer experience. For operating purposes, however, they worked as a team of equals. There was always one locomotive engineer designated to be "in-charge", but this designation varied between the two locomotive engineers, as each took their turn at being "in-charge". As well, their work required the greatest of collaboration and reliance on each other as they were called upon to jointly confirm their running orders. This experience confirmed that there is no observable distinction between the work of the two locomotive engineers in the cab, once they are both fully qualified. As well, evidence was presented that even two recently qualified locomotive engineers, therefore at the bottom of the seniority list, can be assigned to the same train as part of the same team. These facts contradict any argument that

the more senior locomotive engineers should somehow receive a more favourable position because of their locomotive engineer seniority.

[120] Accordingly, Board is of the view that the only way to remedy the differences created between the "haves" and the "have nots", is by creating a fully integrated locomotive engineer classification without distinction between non-NEPO and NEPO locomotive engineers. To achieve this result, the Board deems it necessary to dovetail the seniority of all qualified locomotive engineers by home terminal or seniority district, as the case may be.

[121] This result cannot be said to be totally unexpected. In the original evidence which led to Decision no. 35, the Board heard that in the course of negotiations for the first collective agreement which followed the merging of the bargaining units, VIA proposed this very solution as a means to overcoming a bargaining impasse. The BLE rejected this solution and agreed to go ahead with VIA's CCAA proposal. The BLE did not provide a satisfactory explanation to the Board as to why this position was rejected or why some form of dovetailing was not counter proposed. The end result is to be seen in the provision in the CCAA which puts the BLE's traditional membership at the top of the seniority list.

[122] To give effect to the dovetailing of the seniority list, the trainman date, which represents the date of the beginning of employment service and used to calculate other benefits, is the most objective date by which to establish seniority ranking. This date, therefore, renders irrelevant the universal date of October 31, 1997 applied to all conductors who have since become qualified locomotive engineers. The trainman date is to determine the seniority date of all locomotive engineers within the bargaining unit.

[123] To remedy their loss of earnings due to the breach of their seniority rights, the conductors should receive retroactive pay that reflects their training as a locomotive engineer as if they had been trained and qualified on the date the first former conductor successfully completed the locomotive engineer training program (deemed date of qualification). Given the passage of time, it is impractical, if not impossible to reconstruct schedules to calculate loss of earnings in accordance with this seniority date. It is the Board's judgement that the average rate of pay of locomotive engineers at the conductor's home terminal or seniority district, would be adequate compensation in this regard.

[124] There are certain instances where conductors may have been required, as a result of the impugned effects of the CCAA to transfer to other terminals at their own expense in order to maintain employment. To the extent that there were vacant positions after July 1, 1998 that would have become available to accommodate a conductor, conductors, once qualified as locomotive engineers, should be allowed to elect to return to their home terminal and assume their trainman seniority there. Similarly, conductors who become qualified locomotive engineers but whose home terminal was abolished and conductors for whom no vacant position became available at their home terminal after July 1, 1998, should have an opportunity to maintain their employment at VIA by electing to transfer to another terminal where vacancies exist and assume their trainman seniority there.

[125] For those conductors involuntarily sent back to CN as a result of the arbitrator's decision, and who were required to change terminals at CN to maintain employment, but did not receive a relocation benefit which they would have received in the normal course, they should be compensated for this transfer by receiving a relocation allowance of \$25,000.

[126] The Board is cognizant of the fact that allowing former conductors to transfer throughout the VIA rail system is an exceptional measure. However, it is in response to the exceptional situation created when most VIA conductors lost their employment because they were not given a reasonable opportunity to qualify as locomotive engineers. The object of the redress is to give priority to the placement of former conductors within VIA's ranks now that their craft has been abolished. The Board considers that the more limited rules which allow for transfers only within the seniority district in the case of layoffs should be relaxed in order to allow full opportunity for employment. The Board further considers that VIA's own employees should be preferred for employment before allowing CN locomotive engineers to exercise their transfer rights.

[127] There is no doubt that allowing country-wide transfers may be directed here will be disruptive. The situation could have minimized had the BLE and VIA acted sooner. It is also equitable that such transfers be the subject of a relocation allowance as provided under corporate policy.

[128] This brings us to the issue of lay-offs and recalls or a material change notice initiated by VIA. Now that the bargaining unit has been ordered fully integrated by the dovetailing of seniority, layoffs, recalls and material changes should follow the usual seniority rules which prevail under the collective agreement without distinction or ratio applied as between classes of locomotive engineers.

[129] As well as full integration in the bargaining unit, all employment benefits should be applied as provided in the BLE collective agreement, retroactively to July 1, 1998.

IX - Redress with Respect to the Transfer Agreements

a) Position of the conductors

[130] The conductors proposed solutions on this issue according to their own perspective. They argued that in the event they become qualified locomotive engineers at VIA, they be allowed to flow-back to CN should there be no assignments at VIA, while retaining their seniority rights at VIA. They also submitted that should they be unable to qualify as locomotive engineers at VIA, they should be allowed to return to CN without losing their existing positions. Also, they asked to continue receiving maintenance of earnings acquired under the Mackenzie Award. Finally, the conductors wished an implementation committee to oversee the implementation of the Board's remedies.

[131] The Mackenzie Award is the result of a compulsory Mediation-Arbitration Commission established pursuant to Section 53 of the *Maintenance of Railway Operations Act, 1995*, conducted by Justice Kenneth Mackenzie. Its provisions were incorporated into UTU collective agreements in 1995 and set industry standards, with respect to wage increases, successor rights, protection of seniority, medically restricted employees, maintenance of earnings, retirement opportunities and other benefits, which subsist to this date. Allegedly, the conductors no longer qualified for maintenance of earnings benefits under the Mackenzie Award when they were involuntarily transferred to CN or severed from VIA. Maintenance of earnings means that in the case of lack of work, their earnings do not fall below a certain threshold as guaranteed by the Mackenzie Award.

b) Analysis of the Transfer Agreement

[132] The effect of the proposed MOU as it relates to the transfer of locomotive engineers between CN and VIA in the case of vacancies at VIA is to suspend the BLE Transfer Agreement for a time, except where vacancies cannot be filled in a seniority district (see article 11 of proposed MOU). However, once more, the suspension effects are only future oriented. At best, the proposed MOU protects the employment of CN locomotive engineers who have transferred to VIA since July 1, 1998. It does not provide a remedy that is relevant to the situation of the conductors at that same date. The Board considers that the proposed MOU does not provide an appropriate remedy to the conductors who have been waiting some five years to have access to training and qualification as locomotive engineers.

[133] It should be noted here that the overnight return of the conductors to CN was not without its own difficulties. As most of the conductors had not worked at CN for a number of years, and because passenger duties and freight duties are considerably different, they could not be immediately returned to active duty at CN. Accordingly, some were retrained and resumed active duty over time, some have remained unemployed, some retired and others took severance packages from CN. As a result, the conductors' pensions have been negatively affected. The Board also takes into consideration in ordering remedies that jobs at VIA are considered the most enviable of the railway industry; contrary to freight operations, passenger work is scheduled and carried out on the basis of regular timetables which are the staple of passenger service, and, the work is less physically demanding. As well, VIA's pension plan is more advantageous than that of CN, which explains why the crucial pre-retirement years are in high demand at VIA by CN locomotive engineers having transfer rights.

[134] Consequently, this conclusion has the effect of suspending the bulletining provisions of the BLE Transfer Agreement at CN retroactively to July 1, 1998, until all the conductors who have a right in accordance with the within order to be selected and trained as a result of this decision have been selected, trained and placed into vacancies as VIA locomotive engineers.

[135] The parties argued that the Board did not have the authority to suspend the application of the Transfer Agreements since these Agreements were the result of Ministerial Orders. The Board has not been persuaded that

the provisions of the Transfer Agreements supersede or have the effect of limiting remedial measures enforceable under the *Code*. It is likely that conflicting effects between the Transfer Agreements and the *Code* were never contemplated when the Transfer Agreements were negotiated. However, it would indeed be a strange result if the application of the Transfer Agreements could be used to perpetuate discriminatory conduct against a group of employees in disregard of the remedial provisions under the *Code*.

[136] The evidence is that when the CCAA was negotiated, the BLE proposed and VIA accepted to suspend the application of the BLE Transfer Agreement for a period of time, allegedly to allow conductors to receive training at VIA in order to become qualified locomotive engineers. On the other hand, the Board heard evidence on how the BLE Transfer Agreement was applied selectively during that period order to accommodate the employment interests of some of the BLE's members at CN. This selective application had the effect of depriving conductors from employment opportunities at VIA.

[137] Accordingly, the Board takes the view that if the parties were able to come to an agreement on their own on July 1, 1998, suspending the application of the BLE Transfer Agreement for a period of time, the Board has the authority to also suspend its application as part of remedial measures intended to restore the injured conductors back to a position they would have enjoyed had the discriminatory acts not occurred.

PART V

X - Remedies in the Final Instance

[138] The above analysis does not leave any doubt that to provide full redress to the conductors, the Board's conclusions are far reaching. This does not mean that its conclusions should be modified because of this factor, but that the Board must now consider how such redress can be effectively discharged, given the passage of time and the nature of the employer's business. The first consideration is that some five years have passed since the CCAA was implemented and the majority of conductors are no longer at VIA. The second consideration is that this is an older workforce, where five years is a significant period of time with respect to retirement prospects. What might have been a favourable opportunity for training and employment as a locomotive engineers in 1998, is notably less

appealing in 2003, with prospects for employment likely to be in 2004. The third consideration is that to apply full redress will disrupt VIA's entire passenger service across Canada, with unpredictable effects on the travelling public. For conductors' opportunities for employment at VIA to remain open, VIA must be able to maintain customer confidence. The reorganization of crew consists across the country is not conducive to achieving this objective. The fourth consideration is that the Board's conclusions also have an effect on CN locomotive engineers who have since transferred to VIA since July 1, 1998. Their bulk return to CN as a result of the instant decision could potentially have the same ripple effect, though to a lesser degree, as the return of the conductors to CN following the 1999 arbitral award. The fifth consideration is that it is unlikely that all complainants would have had access to vacant locomotive engineer positions on and after July 1, 1998. Therefore, all remedies cannot equally apply to all conductors.

[139] Therefore, the Board has decided on an alternate form of compensation. The objective of the compensation is to provide a monetary settlement in lieu of full redress and to create opportunities for employment for those conductors who maintain an interest in working at VIA.

[140] In order to create an appropriate settlement, the Board, therefore, decides the following:

- i) VIA is to create a document identifying all locomotive engineer vacancies at VIA on and since July 1, 1998 to the date of this decision. This document is to be remitted to the BLE and the conductors' representative, no later than June 15, 2003.
- ii) Conductors and the BLE shall have until July 15, 2003 to review the list and address any necessary corrections with VIA.
- iii) Conductors shall have until June 15, 2003 to request in writing from VIA a statement of the financial and benefit consequences of opting out of retirement or severance.
- iv) VIA shall have until July 15, 2003 to respond to individual conductors' requests for financial and benefit consequences information.

v) All conductors who chose to do so, shall be allowed to take the Bennett Mechanical Test. The passing mark is set at 60%. Are excluded from being taking the test, conductors who elected to retire as a first option under the CCAA and who subsequently retired at VIA.

vi) Conductors who are not working as qualified locomotive engineers and who are on current priority lists are not required to repeat the test (even if their passing mark was below 60%) and are to be included on the eligibility list set out below.

vi) A national committee shall be created to set the correction standards for the Bennett Mechanical Test and interview all the conductors who elect to take the test.

vii) The national committee shall be composed of an employer representative, a locomotive engineer representative designated by the BLE and a now trained locomotive engineer from the conductor ranks, all having an equal voice in the selection process. The national committee shall complete its evaluation and ranking of conductors no later than August 29, 2003. The decision of the national committee shall be final, except for obvious errors in the administration and marking of tests.

viii) Conductors who pass the test shall be ranked in seniority order, hereinafter called the eligibility list.

ix) A number of conductors from the eligibility list, equivalent to the number of vacancies on or created since July 1, 1998, shall be entitled to receive monetary compensation in lieu of the redress as provided in the Board's conclusions. This number shall be calculated to include conductors who have become qualified locomotive engineers and are working at VIA. Conductors who were not able to qualify or apply for locomotive engineer training because of a medical disability shall be entitled to compensation without the need to fill a vacancy.

x) Conductors remaining on the eligibility list who are not entitled to receive compensation in lieu of redress, shall be entitled to receive training to become a qualified locomotive engineer as locomotive engineer positions become vacant or are created across Canada, until there are no conductors remaining on that list.

Upon becoming qualified locomotive engineers, a conductor's seniority shall be dovetailed within the terminal or seniority district, as the case may be, where employment is accepted. Conductors shall be entitled to expenses and wages during the training period and a relocation benefit equal to corporate policy if they accept to relocate.

xi) Conductors who have become qualified locomotive engineers since July 1, 1998 and are working as locomotive engineers at VIA shall have their seniority dovetailed, by terminal or seniority district, as the case may be, where they are presently employed. They shall be entitled to retroactive compensation covering any loss of earnings and benefits resulting from their inferior seniority rank as if they had been trained and qualified on the date the first former conductor successfully completed the locomotive engineer training program.

xii) Conductors who qualify for monetary compensation under the terms of this decision, shall have until September 30, 2003, to make written submissions to the Board on the amount of their claim. The BLE and VIA shall have until October 31, 2003 to respond to the conductors' submissions for compensation. Conductors shall have until November 14, 2003 to reply.

xiii) The Board shall thereafter determine the amount of compensation owed under each claim, which may be decided with or without a hearing, at its discretion.

xiv) The Board shall further determine as between the BLE and VIA, the apportionment of financial responsibility for the monetary compensation being ordered within. Written representations on the apportionment of financial responsibility shall be submitted by the BLE, no later than September 30, 2003 with a response from VIA, no later than October 31, 2003. The BLE shall have until November 15, 2003 to reply. The Board may, at its discretion, decide this issue without holding oral hearings.

xv) Conductors are to be paid their legal fees and expenses on a solicitor-client basis with regard to the hearing on the remedies and the implementation of remedial orders within, if necessary, with interest

calculated on the Snively/Hallowell method as of the thirtieth day following the date on which the account is received by the BLE's solicitor.

xvi) Conductors are to be paid their expenses and wages with regard to the hearing on the remedies and the subsequent remedial orders, no later than June 30, 2003.

[141] The Board remains seized of any question arising from this decision and the ensuing orders.

Michele A. Pineau
Vice-Chairperson

ATTACHMENT: Appendix A

POSITION INFORMATION BY TERMINAL

MONCTON (Territory D)	
Total no. of running trades employees at June 30, 1998	9
No. of locomotive engineers at June 30, 1998	6*
No. of conductors at June 30, 1998	3
Locomotive engineer positions available at August 31, 2002	6
Conductors who have become qualified locomotive engineers since July 1, 1998	0
Conductors eligible for priority list since July 1, 1998	2
Conductors medically restricted	
Conductors on pension at VIA	1
Locomotive engineers on pension at VIA	
Conductors working at CN	
Conductors on pension at CN	1
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior locomotive engineer (trainman date) now working	69-01-23
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	74-05-18
Most senior conductor (trainman date) now working at VIA	N/A
SPECIAL NOTES	* includes one VIA management employee returned to bargaining unit with previously earned CN seniority date of 80-01-01

POSITION INFORMATION BY TERMINAL

MONCTON (Territory F)	
Total no. of running trades employees at June 30, 1998	17
No. of locomotive engineers at June 30, 1998	8
No. of conductors at June 30, 1998	9
Locomotive engineer positions available at August 31, 2002	8
Conductors who have become qualified locomotive engineers since July 1, 1998	0
Conductors eligible for priority list since July 1, 1998	7
Conductors medically restricted	
Conductors on pension at VIA	1
Locomotive engineers on pension at VIA	
Conductors working at CN	7
Conductors on pension at CN	1
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior locomotive engineer (trainman date) now working	56-02-09
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	72-01-10
Most senior conductor (trainman date) now working at VIA	N/A
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

NEW CARLISLE (K Territory)	
Total no. of running trades employees at June 30, 1998	10
No. of locomotive engineers at June 30, 1998	5
No. of conductors at June 30, 1998	5
Locomotive engineer positions available at August 31, 2002	5
Conductors who have become qualified locomotive engineers since July 1, 1998	2
Conductors eligible for priority list since July 1, 1998	2
Conductors medically restricted	
Conductors on pension at VIA	1
Locomotive engineers on pension at VIA	2
Conductors working at CN	
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	2
Most senior locomotive engineer (trainman date) now working	69-07-14
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	74-07-10
Most senior conductor (trainman date) now working at VIA	74-07-10
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

CAMPBELLTON (K Territory)	
Total no. of running trades employees at June 30, 1998	5
No. of locomotive engineers at June 30, 1998	5
No. of conductors at June 30, 1998	0*
Locomotive engineer positions available at August 31, 2002	5
Conductors who have become qualified locomotive engineers since July 1, 1998	N/A
Conductors eligible for priority list since July 1, 1998	N/A
Conductors medically restricted	
Conductors on pension at VIA	
Locomotive engineers on pension at VIA	
Conductors working at CN	
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior locomotive engineer (trainman date) now working	69-08-10
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	
Most senior conductor (trainman date) now working at VIA	
SPECIAL NOTES	*There were no conductors at this terminal.

POSITION INFORMATION BY TERMINAL

SENNETERRE (District 2)	
Total no. of running trades employees at June 30, 1998	12
No. of locomotive engineers at June 30, 1998	6
No. of conductors at June 30, 1998	6
Locomotive engineer positions available at August 31, 2002	5
Conductors who have become qualified locomotive engineers since July 1, 1998	0
Conductors eligible for priority list since July 1, 1998	4
Conductors medically restricted	
Conductors on pension at VIA	2
Locomotive engineers on pension at VIA	1
Conductors working at CN	3
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	1
Most senior locomotive engineer (trainman date) now working	71-04-25
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	71-09-19
Most senior conductor (trainman date) now working at VIA	N/A
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

QUEBEC EAST (K Territory)	
Total no. of running trades employees at June 30, 1998	11
No. of locomotive engineers at June 30, 1998	1
No. of conductors at June 30, 1998	10
Locomotive engineer positions available at August 31, 2002	1*
Conductors who have become qualified locomotive engineers since July 1, 1998	0
Conductors eligible for priority list since July 1, 1998	8
Conductors medically restricted	
Conductors on pension at VIA	
Locomotive engineers on pension at VIA	
Conductors working at CN	6
Conductors on pension at CN	2
Conductors severed from VIA	
Conductors not working (and no severance)	2
Most senior locomotive engineer (trainman date) now working	70-07-09
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	74-10-21
Most senior conductor (trainman date) now working at VIA	N/A
SPECIAL NOTES	* Only one locomotive engineer working at this terminal. When he leaves employment at VIA, conductors on priority list must transfer to Quebec East (2 nd District)

POSITION INFORMATION BY TERMINAL

QUEBEC (District 2)	
Total no. of running trades employees at June 30, 1998	58
No. of locomotive engineers at June 30, 1998	38
No. of conductors at June 30, 1998	20
Locomotive engineer positions available at August 31, 2002	38
Conductors who have become qualified locomotive engineers since July 1, 1998	5
Conductors eligible for priority list since July 1, 1998	5*
Conductors medically restricted	
Conductors on pension at VIA	7
Locomotive engineers on pension at VIA	5
Conductors working at CN	5
Conductors on pension at CN	2
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior locomotive engineer (trainman date) now working	64-11-02
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	67-08-24
Most senior conductor (trainman date) now working at VIA	71-12-24
SPECIAL NOTES	* When locomotive engineer working at Quebec East K Territory terminal leaves employment at VIA, conductors on that priority list must transfer to this district)

POSITION INFORMATION BY TERMINAL

MONTREAL NORTH (District 2)	
Total no. of running trades employees at June 30, 1998	10
No. of locomotive engineers at June 30, 1998	5
No. of conductors at June 30, 1998	5
Locomotive engineer positions available at August 31, 2002	5
Conductors who have become qualified locomotive engineers since July 1, 1998	0
Conductors eligible for priority list since July 1, 1998	0
Conductors medically restricted	1
Conductors on pension at VIA	2
Locomotive engineers on pension at VIA	1
Conductors working at CN	2
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior locomotive engineer (trainman date) now working	69-07-04
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	70-07-18
Most senior conductor (trainman date) now working at VIA	N/A
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

MONTREAL (District 3)	
Total no. of running trades employees at June 30, 1998	51
No. of locomotive engineers at June 30, 1998	29
No. of conductors at June 30, 1998	22
Locomotive engineer positions available at August 31, 2002	29 + 5 added positions = 34
Conductors who have become qualified locomotive engineers since July 1, 1998	8
Conductors eligible for priority list since July 1, 1998	5
Conductors medically restricted	
Conductors on pension at VIA	5
Locomotive engineers on pension at VIA	3
Conductors working at CN	9
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior locomotive engineer (trainman date) now working	69-05-10
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	67-02-16
Most senior conductor (trainman date) now working at VIA	73-02-27
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

OTTAWA (District 3)	
Total no. of running trades employees at June 30, 1998	15
No. of locomotive engineers at June 30, 1998	7
No. of conductors at June 30, 1998	8
Locomotive engineer positions available at August 31, 2002	7 + 2 added positions = 9
Conductors who have become qualified locomotive engineers since July 1, 1998	2
Conductors eligible for priority list since July 1, 1998	0
Conductors medically restricted	2*
Conductors on pension at VIA	
Locomotive engineers on pension at VIA	
Conductors working at CN	1
Conductors on pension at CN	2*
Conductors severed from VIA	1
Conductors not working (and no severance)	
Most senior locomotive engineer (trainman date) now working	55-08-25
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	57-07-10
Most senior conductor (trainman date) now working at VIA	77-05-06
SPECIAL NOTES	* Same employees. Because of medical restrictions have taken pension at CN.

POSITION INFORMATION BY TERMINAL

TORONTO SOUTH (District 4)	
Total no. of running trades employees at June 30, 1998	205
No. of locomotive engineers at June 30, 1998	110*
No. of conductors at June 30, 1998	95**
Locomotive engineer positions available at August 31, 2002	110 + 23 added positions = 133
Conductors who have become qualified locomotive engineers since July 1, 1998	31
Conductors eligible for priority list since July 1, 1998	8
Conductors medically restricted	
Conductors on pension at VIA	16
Locomotive engineers on pension at VIA	9
Conductors working at CN	24
Conductors on pension at CN	5
Conductors severed from VIA	11
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	63-09-03
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	64-04-10
Most senior conductor (trainman date) now working at VIA	71-09-17
SPECIAL NOTES	<p>* 5 most junior locomotive engineers are direct hires ("Pure VIA") employees with less seniority than any of the conductors.</p> <p>** 6 conductors now occupy other positions at VIA.</p>

POSITION INFORMATION BY TERMINAL

TORONTO NORTH (District 6)	
Total no. of running trades employees at June 30, 1998	10
No. of locomotive engineers at June 30, 1998	5
No. of conductors at June 30, 1998	5*
Locomotive engineer positions available at August 31, 2002	5
Conductors who have become qualified locomotive engineers since July 1, 1998	1
Conductors eligible for priority list since July 1, 1998	1
Conductors medically restricted	
Conductors on pension at VIA	2
Locomotive engineers on pension at VIA	1
Conductors working at CN	1
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	64-06-28
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	72-04-04
Most senior conductor (trainman date) now working at VIA	72-04-04
SPECIAL NOTES	* One conductor deceased.

POSITION INFORMATION BY TERMINAL

HORNEPAYNE (District 6)	
Total no. of running trades employees at June 30, 1998	16
No. of locomotive engineers at June 30, 1998	8
No. of conductors at June 30, 1998	8
Locomotive engineer positions available at August 31, 2002	8 + 2 added = 10
Conductors who have become qualified locomotive engineers since July 1, 1998	2
Conductors eligible for priority list since July 1, 1998	3
Conductors medically restricted	
Conductors on pension at VIA	1
Locomotive engineers on pension at VIA	
Conductors working at CN	4
Conductors on pension at CN	
Conductors severed from VIA	1
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	56-10-31
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	65-06-27
Most senior conductor (trainman date) now working at VIA	67-05-10
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

WINNIPEG (District 7)	
Total no. of running trades employees at June 30, 1998	29
No. of locomotive engineers at June 30, 1998	13
No. of conductors at June 30, 1998	16
Locomotive engineer positions available at August 31, 2002	13
Conductors who have become qualified locomotive engineers since July 1, 1998	0 (1)*
Conductors eligible for priority list since July 1, 1998	3
Conductors medically restricted	
Conductors on pension at VIA	6
Locomotive engineers on pension at VIA	
Conductors working at CN	3
Conductors on pension at CN	
Conductors severed from VIA	5
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	56-04-11
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	65-06-27
Most senior conductor (trainman date) now working at VIA	74-04-11
SPECIAL NOTES	* One conductor qualified as a locomotive engineer transferred to Dauphin Terminal and is counted as part of that terminal.

POSITION INFORMATION BY TERMINAL

DAUPHIN (District 7)	
Total no. of running trades employees at June 30, 1998	6
No. of locomotive engineers at June 30, 1998	2
No. of conductors at June 30, 1998	4
Locomotive engineer positions available at August 31, 2002	2 + 1 added = 3
Conductors who have become qualified locomotive engineers since July 1, 1998	1*
Conductors eligible for priority list since July 1, 1998	0
Conductors medically restricted	
Conductors on pension at VIA	
Locomotive engineers on pension at VIA	
Conductors working at CN	
Conductors on pension at CN	
Conductors severed from VIA	2
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	71-07-13
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	64-09-17
Most senior conductor (trainman date) now working at VIA	75-06-26
SPECIAL NOTES	* This conductor transferred from Winnipeg Terminal to Dauphin Terminal. One conductor transferred from Dauphin to Canora and is counted on the Canora list.

POSITION INFORMATION BY TERMINAL

CANORA (District 7)	
Total no. of running trades employees at June 30, 1998	4
No. of locomotive engineers at June 30, 1998	3
No. of conductors at June 30, 1998	1
Locomotive engineer positions available at August 31, 2002	3 + 1 added = 4*
Conductors who have become qualified locomotive engineers since July 1, 1998	1**
Conductors eligible for priority list since July 1, 1998	0
Conductors medically restricted	
Conductors on pension at VIA	
Locomotive engineers on pension at VIA	
Conductors working at CN	
Conductors on pension at CN	
Conductors severed from VIA	2
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	69-07-23
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	75-06-26
Most senior conductor (trainman date) now working at VIA	75-06-26
SPECIAL NOTES	<p>* All employees at this terminal working as locomotive engineers.</p> <p>**This conductor transferrred from Dauphin to Canora.</p>

POSITION INFORMATION BY TERMINAL

THE PAS (District 7)	
Total no. of running trades employees at June 30, 1998	8
No. of locomotive engineers at June 30, 1998	4
No. of conductors at June 30, 1998	4
Locomotive engineer positions available at August 31, 2002	4*
Conductors who have become qualified locomotive engineers since July 1, 1998	3
Conductors eligible for priority list since July 1, 1998	0
Conductors medically restricted	
Conductors on pension at VIA	1
Locomotive engineers on pension at VIA	3
Conductors working at CN	
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	72-06-17
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	76-07-16
Most senior conductor (trainman date) now working at VIA	76-07-16
SPECIAL NOTES	* All employees at this terminal working as locomotive engineers. Conductor who retired elected pension as first option.

POSITION INFORMATION BY TERMINAL

BIGGAR (District 7)	
Total no. of running trades employees at June 30, 1998	6
No. of locomotive engineers at June 30, 1998	6
No. of conductors at June 30, 1998	0
Locomotive engineer positions available at August 31, 2002	6
Conductors who have become qualified locomotive engineers since July 1, 1998	
Conductors eligible for priority list since July 1, 1998	
Conductors medically restricted	
Conductors on pension at VIA	
Locomotive engineers on pension at VIA	
Conductors working at CN	
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	64-11-12
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	N/A
Most senior conductor (trainman date) now working at VIA	N/A
SPECIAL NOTES	* All employees at this terminal working as locomotive engineers. No conductors at this terminal.

POSITION INFORMATION BY TERMINAL

EDMONTON (District 9)	
Total no. of running trades employees at June 30, 1998	17
No. of locomotive engineers at June 30, 1998	7
No. of conductors at June 30, 1998	10
Locomotive engineer positions available at August 31, 2002	7
Conductors who have become qualified locomotive engineers since July 1, 1998	2
Conductors eligible for priority list since July 1, 1998	2
Conductors medically restricted	
Conductors on pension at VIA	5
Locomotive engineers on pension at VIA	2
Conductors working at CN	1
Conductors on pension at CN	1
Conductors severed from VIA	1
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	57-03-09
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	64-08-14*
Most senior conductor (trainman date) now working at VIA	67-06-03
SPECIAL NOTES	* The most eligible senior conductor is now be 69 years old and not likely to resume employment at VIA.

POSITION INFORMATION BY TERMINAL

KAMLOOPS (District 9)	
Total no. of running trades employees at June 30, 1998	24
No. of locomotive engineers at June 30, 1998	12
No. of conductors at June 30, 1998	12
Locomotive engineer positions available at August 31, 2002	12 + 2 added = 14
Conductors who have become qualified locomotive engineers since July 1, 1998	4
Conductors eligible for priority list since July 1, 1998	2
Conductors medically restricted	
Conductors on pension at VIA	4
Locomotive engineers on pension at VIA	2
Conductors working at CN	3
Conductors on pension at CN	
Conductors severed from VIA	1
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	58-08-21
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	64-07-24
Most senior conductor (trainman date) now working at VIA	70-10-24
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

PRINCE GEORGE (District 9)	
Total no. of running trades employees at June 30, 1998	11
No. of locomotive engineers at June 30, 1998	6
No. of conductors at June 30, 1998	5
Locomotive engineer positions available at August 31, 2002	6 + 1 added = 7
Conductors who have become qualified locomotive engineers since July 1, 1998	1
Conductors eligible for priority list since July 1, 1998	1
Conductors medically restricted	
Conductors on pension at VIA	2
Locomotive engineers on pension at VIA	
Conductors working at CN	2
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	56-07-22
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	72-01-01
Most senior conductor (trainman date) now working at VIA	75-08-12
SPECIAL NOTES	

POSITION INFORMATION BY TERMINAL

SMITHERS (District 9)	
Total no. of running trades employees at June 30, 1998	7
No. of locomotive engineers at June 30, 1998	4
No. of conductors at June 30, 1998	3
Locomotive engineer positions available at August 31, 2002	4 + 1 added = 5
Conductors who have become qualified locomotive engineers since July 1, 1998	1
Conductors eligible for priority list since July 1, 1998	0
Conductors medically restricted	
Conductors on pension at VIA	1
Locomotive engineers on pension at VIA	
Conductors working at CN	1
Conductors on pension at CN	
Conductors severed from VIA	
Conductors not working (and no severance)	
Most senior working locomotive engineer (trainman date)	72-01-01
Most senior conductor (trainman date) <u>eligible</u> for selection as a result of Board's decision	78-06-24
Most senior conductor (trainman date) now working at VIA	81-03-09
SPECIAL NOTES	