

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1963

Heard at Montreal, Thursday, 12 October 1989

Concerning

VIA RAIL CANADA INC.

And

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

L. Kowalski not allowed to exercise seniority to the position of Telephone Sales Agent.

JOINT STATEMENT OF ISSUE:

In March 1987, the grievor attempted to exercise her seniority to a position of Telephone Sales Agent. She had previously achieved a passing mark for the position in December 1985, and last worked on the position in December 1983.

Due to the complexity of the Reservia System, all employees, who are away from the Reservia environment in excess of six months, are re-evaluated prior to being permitted to displace. The grievor was tested and failed to achieve a passing mark, therefore was not permitted to displace on a Telephone Sales Agent position.

The Brotherhood contends that the grievor was denied the opportunity in a fair and impartial manner to prove her qualifications, and requests that she be allowed to demonstrate her qualifications in accordance with Article 12.17, and compensated for lost wages.

The Corporation has denied the grievance and maintains that the test the grievor took on April 16, 1987 was the same test she would have been requested to take to demonstrate her qualifications under Article 12.17.

FOR THE BROTHERHOOD:

(SGD) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD) A. D. ANDREW
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. O. White – Labour Relations Officer, Montreal
C. O. Pollock – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

A. Cerrilli – Regional Vice-President, Winnipeg

AWARD OF THE ARBITRATOR

It is common ground that the Corporation was entitled to administer the first test which it did, and which the grievor was unsuccessful in passing. The dispute concerns whether the Corporation was obligated to allow her the opportunity to demonstrate her ability by taking a second test, in compliance with Article 12.17. The record discloses that after a considerable period of time, at the conclusion of Step 3 of the grievance procedure, the Corporation did allow Ms. Kowalski to take a second test. It appears that she successfully passed it and assumed the position of Telephone Sales Agent for a brief period prior to her resignation from the Corporation.

The parties remain divided, however, on whether the Corporation had an obligation to allow her a second opportunity to demonstrate her ability immediately after she failed the initial test. In the instant case it is not disputed that Ms. Kowalski returned to work following a leave of absence for a compensable injury. Under Article 12.15 Ms. Kowalski was permitted to exercise her seniority to a T.S.A. position within five working days of her return. The Corporation did not allow her to exercise her seniority, however, to move directly into the position. Because of the highly technical nature of the job, its policy is that employees who are away from the position for a period in excess of six months must write an evaluation test before being allowed to resume such a position by the exercise of seniority. A test was administered, which the grievor failed. The issue then arising was whether she was entitled to a further opportunity to demonstrate her qualifications pursuant to the provisions of Article 12.17 which is as follows:

12.17 When a senior applicant is not awarded a bulletined position, he may appeal the appointment, in writing, within 14 calendar days of such appointment through the grievance procedure. After making an appeal, he may be required or shall at the request of the Local Chairperson or authorized Committee person be allowed to demonstrate his qualifications for the position. The Local Chairperson or authorized Committee person may be present at such demonstration.

The position of the Corporation is that it would have served no purpose to re-test the grievor on the same material which she had failed to pass on the occasion of the first test. While there was some uncertainty as the grievance was initiated, the position of the Brotherhood matured to a demand that she be allowed to demonstrate her qualifications as outlined in Article 12.17. The formal reply of the Corporation at the second stage was, as described in its brief to the Arbitrator:

... that the test that Ms. Kowalski took on April 16, 1987 was the same test she would have required to take to demonstrate her qualifications under Article 12.17, and from the result of the April 16 test, it was satisfied that the grievor was unqualified for the position.

With that position the Arbitrator has some difficulty. Firstly, Article 12.17 does not predicate an employee's right to appeal the appointment and be given an opportunity to demonstrate qualifications on the subjective opinion of the Corporation of the likelihood of success. The article states that at the request of the Local Chairperson, the employee shall again be allowed the opportunity to demonstrate his or her qualifications for the position. To the extent that, in his letter of May 1, 1987 the Brotherhood's Local Chairman requested that Ms. Kowalski "... be given a fair and proper opportunity to prove her qualifications.", and that at Step 2 of the grievance procedure the Brotherhood specifically requested that she be allowed to demonstrate her qualifications as outlined in Article 12.17, it appears manifest that the Brotherhood did everything it reasonably could have to trigger the application of that article.

On a plain reading of the provisions of Article 12.17 the Arbitrator cannot sustain the position of the Corporation that it was entitled to deny the grievor the opportunity of a second chance to demonstrate her qualifications. There is, quite simply, no latitude within the language of Article 12.17 for the Corporation to assert such a position when the request is made by the Local Chairperson.

Secondly, the Arbitrator has substantial difficulty with the practical position espoused by the Corporation in respect of the grievor's chances of succeeding on a second test. Her own work history with the Corporation affirmatively demonstrates a contrary possibility as to the outcome of a second test. She took a qualifying test for the same position on November 15, 1985 and failed it, attaining a mark of 40%, when the passing mark was 80%. She was then allowed to write the test a second time, some two weeks later, on December 2, 1985. On that occasion she qualified with a passing mark of 89%. On the basis of that history, the Arbitrator has substantial difficulty in accepting the Corporation's view that a second test would have been futile. More importantly, however, as noted

above, that judgement is irrelevant, insofar as the grievor's right to a second opportunity to demonstrate her qualifications is mandatorily protected by the terms of Article 12.17.

For the foregoing reasons the grievance must be allowed. As Ms. Kowalski has resigned her position from the Corporation at the present time, this award is limited to a declaration that the Corporation violated the Collective Agreement as alleged by the Brotherhood, and a direction that the Corporation pay forthwith to the grievor compensation to reflect earnings at the rate of the position of Telephone Sales Agent for all days which she was at work from April 16, 1987 to her date of resignation.

October 12, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR