

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2290

Heard at Montreal, Thursday, 15 October 1992

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

The entitlement of Ms. A. Sawyer to a position of Employee Services Clerk.

JOINT STATEMENT OF ISSUE:

On February 5, 1991, Ms. Sawyer applied for item 6 on VIA HQ Regional Bulletin #2.

The Corporation awarded the position to Mr. D. Longtin, an employee on Employment Security status junior to Ms. Sawyer.

The Brotherhood alleges that the Corporation has violated Articles 12.3, 12.16 and 16.3 of Collective Agreement No. 1. The Brotherhood argues that Ms. Sawyer had a right to the position and should have been given training in preference to the junior E.S. employee.

The Corporation denies any violation of the Collective Agreement. The Corporation believes that Ms. Sawyer was not qualified for the position of Employee Services Clerk. The Corporation also had serious concerns about Ms. Sawyer for the job in question because she is a unilingual anglophone and the position in dispute was located at the Montreal Maintenance Centre, where the language of work is French. The Corporation has rejected the grievance at all steps of the Grievance Procedure.

FOR THE BROTHERHOOD:

(SGD.) J. D. HUNTER
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

C. Pollock	– Senior Officer, Labour Relations Montreal
M. St-Jules	– Senior Negotiator & Advisor, Labour Relations, Montreal
D. S. Fisher	– Senior Officer, Labour Relations Montreal
J. R. Kish	– Senior Advisor, Labour Relations, Montreal

And on behalf of the Brotherhood:

T. N. Stol	– National Vice-President, Ottawa
L. A. Dowhanik	– Local Officer, Montreal, witness
A. Sawyer	– Grievor

AWARD OF THE ARBITRATOR

The fundamental position advanced by the Corporation is that the grievor was not qualified for the position of Employee Services Clerk at the Montreal Maintenance Centre, by virtue of her not being bilingual. It is implicit from paragraph 12 of the Corporation's presentation that the grievor would have been entitled to the position had she been qualified. The findings in this award are, therefore, based upon that premise.

The primary issue is whether the ability to speak and write the French language is a requirement of the job. The Arbitrator fully appreciates the importance to the Corporation of establishing and filling bilingual positions where it is in its legitimate business interests to do so, whether with respect to its service to the public or its own internal administration. In the instant case, however, the best evidence of whether such a requirement exists in respect of the clerk's position at the Montreal Maintenance Centre is the job bulletin itself. Clearly, on the face of that document, while bilingualism is described as "an asset" it is not made a requirement of the job. Additionally, it is common ground that the administrative forms utilized by the clerk are bilingual, and that the computer program utilized in the job is in the English language. On the whole, the Arbitrator is not persuaded that proficiency in the French language, to the level of bilingualism, is a bona fide requirement for the position which is the subject of this dispute. That conclusion is further reinforced by the fact that the issue of the grievor's language skills was not raised in the Corporation's initial reply to the grievance. On the whole, the Arbitrator is satisfied that bilingualism is not a requirement of the job, and that insofar as language is concerned, the grievor must be deemed qualified for the position.

It is common ground that neither the grievor nor the incumbent, Mr. D. Longtin was qualified in the workings of the pensions and benefits system. In the Arbitrator's view, the brief training which was provided to Mr. Longtin in respect of that system should have been equally available to the grievor. I must accept the submission of the Brotherhood that in this respect, the senior qualifiable person has the better right to the position. It should be noted that this conclusion does not preclude the Corporation from placing a person in the position of Mr. Longtin, who is on employment security, into productive work. The backfilling of other positions, such as that caused by the movement of the grievor, might well provide an opportunity to accomplish that end.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that Ms. Sawyer be awarded the position of Employee Services Clerk at the Montreal Maintenance Centre, that she be given the necessary training with respect to the pension and benefits system, and that she be compensated for all wages and benefits lost.

The Brotherhood seeks the further payment of interest. The Arbitrator has some difficulty with the submission of the Corporation that, as a general matter, interest is not payable in respect of an order of compensation by this Office. The preponderant Canadian jurisprudence holds that the failure to pay interest can amount to a windfall in the hands of the party which has been found to have violated the collective agreement, and falls short providing real compensation to the employee concerned. (See Brown & Beatty, Canadian Labour Arbitration, Third Edition, 2.1414.) However, I am satisfied that in the instant case, having regard to the time taken in progressing the grievance, an order for the payment of interest is not appropriate.

October 16, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR