

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2434

Heard in Montreal, Thursday, 16 December 1993

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Ms. Lee Ann Dowhanik's entitlement to displace onto the position of Clerk, Pension and Administration and Clerk, Employee Services.

JOINT STATEMENT OF ISSUE:

The grievor was advised by the Corporation on December 8, 1992, that she would not be allowed to displace onto the above positions, due to a potential conflict of interest, resulting from her responsibilities as Secretary-Treasurer of the Brotherhood's local in Montreal.

The Brotherhood contends that the Corporation's stance is unreasonable, inconsistent with past practice and discriminatory. The Brotherhood further maintains that the Corporation is in violation of all provisions of Collective Agreement No. 1, and is also in conflict with the Charter of Rights by not allowing the grievor to displace onto said positions.

As settlement of this dispute, the Brotherhood requests that the "conflict of interest" restriction be lifted, that the grievor be allowed to assume the positions in question and that she be reimbursed for any lost wages and benefits.

The Corporation declined the grievance.

The Corporation does not believe that Ms. Dowhanik should be placed in a situation where her obligations to protect confidential information, with which the positions deal on an ongoing basis, conflict with her obligations to protect the Brotherhood's interests in her capacity as Local Secretary-Treasurer.

The Corporation further denies any past practice and maintains that there has been no violation of the collective agreement. Finally, should the Brotherhood wish to pursue its allegation of potential conflict under the Charter of Rights, the Corporation believes that this issue should be addressed through the appropriate forum.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

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

There appeared on behalf of the Corporation:

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| C. Rouleau | - Senior Officer, Labour Relations, Montreal |
| C. Pollock | - Senior Officer, Labour Relations, Montreal |
| D. Fisher | - Senior Negotiator & Advisor, Labour Relations, Montreal |
| A. Houde | - Advisor, Performance Management Programs, Montreal |
| D. Depelteau | - Officer, Procedures & Human Resources Services, Montreal |

And on behalf of the Brotherhood:

- | | |
|-----------|-------------------------------------|
| A. Wepruk | - Regional Vice-President, Montreal |
| J. Brown | - Representative, Montreal |

F. Bisson – Local Chairperson, Montreal
L. A. Dowhanik – Grievor

PRELIMINARY AWARD OF THE ARBITRATOR

For the reasons stated by the Arbitrator at the hearing, this is not a case where this Office should adjourn this grievance pending resolution of the complaint filed before the Canada Labour Relations Board. The rights of the grievor under the terms of the collective agreement are different in substance from those to be considered by the Canada Labour Relations Board, whose jurisdiction relates to the allegations of unfair labour practice made by the Brotherhood. There is, moreover, no basis to adjourn the matter for a lack of particularity in the Joint Statement of Issue, as argued by the Corporation, since the Corporation has effectively waived that position by itself signing the Joint Statement of Issue.

The matter shall therefore be continued for hearing on its merits.

17 December 1993

(sgd) MICHEL G. PICHER
ARBITRATOR

On Tuesday, 11 January 1994, there appeared on behalf of the Corporation:

C. Pollock – Senior Officer, Labour Relations, Montreal
C. Rouleau – Senior Officer, Labour Relations, Montreal
A. Houde – Advisor, Performance Management Programs, Montreal
D. Depelteau – Officer, Procedures & Human Resources Services, Montreal

And on behalf of the Brotherhood:

A. Wepruk – Regional Vice-President, Montreal
F. Bisson – Local Chairperson, Montreal
L. A. Dowhanik – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the grievor previously held the position of Clerk, Employee Services. Because of her misuse of confidential information gained in that position, for the benefit of the Brotherhood, she was previously disciplined, with the assessment of ten demerits being sustained by a decision of this Office (**CROA 2433**). The evidence further discloses that the grievor failed to pass a test to establish her qualifications for the position of Clerk, Pension and Administration. That result was not grieved, and the only issue remaining to be determined is whether the position of the Corporation, that the grievor cannot displace onto the position of Clerk, Employee Services, because of her elected office as Secretary/Treasurer of the Brotherhood's local in Montreal is in violation of the collective agreement.

The Corporation seems to take the position that, because of her prior conduct, Ms. Dowhanick should be deprived of access to the position. The employer does not state a broader position, namely that all union officers are to be precluded from the position in question. Viewed in that light, the Corporation's posture appears to involve something of a disciplinary response in relation to a specific individual, rather than a policy position which would apply to all employees in a similar situation.

Labour relations boards, when called upon to fashion a bargaining unit, frequently exclude persons whose duties and responsibilities involve the handling of information which may be confidential in relation to collective bargaining matters. At the hearing of **CROA 2433** it was disclosed, for example, that certain secretarial positions within the Corporation's headquarters are excluded from the bargaining unit on that basis. The position of Clerk, Employee Services previously held by the grievor, however, has never been so excluded. It is, in other words, a position fully covered by the terms of the collective agreement, just as the grievor is an individual covered by its provisions.

It is not disputed that, in the case at hand, Ms. Dowhanick is entitled to invoke her rights under article 13 of the collective agreement. That includes the right to displace a junior employee in her own seniority group on a temporary or permanent position, for whose position she is qualified, in keeping with article 13.3 of the collective agreement. Upon a review of the facts and of the provisions of the collective agreement, the Arbitrator can see no

basis within that document for the Corporation to deny the grievor access to the position of Clerk, Employee Services.

Can this matter properly be said to be disciplinary? I think not. As related in **CROA 2433**, Ms. Dowhanick has already been disciplined, by the assessment of demerit marks, for the misuse of confidential information for the benefit of her union. To revisit that infraction upon her for the purposes of limiting her bumping rights under the collective agreement is, in my view, a form of double jeopardy not contemplated by the parties' agreement. It is, of course, entirely possible that an employee may, by repeated infractions and an apparent failure to achieve rehabilitation, demonstrate that he or she does not possess the qualities requisite for a position of trust. That, however, is not disclosed in the case at hand. Ms. Dowhanick committed a transgression and was disciplined for it. Upon the affirming of the discipline at arbitration, she should be assumed capable of going forward in the job with an understanding of the expectations that will attach in respect of her future conduct.

If the issue is viewed as non-disciplinary, it should not, I think, be concluded that the grievor has demonstrated her lack of qualifications by a single error. However, needless to say, any repetition of similar infractions in the future would, for the reasons touched upon, give the employer reason to review the grievor's overall suitability for the job in question.

For the foregoing reasons the grievance must be allowed. The Arbitrator directs that the grievor be allowed access to the position of Clerk, Employee Services, subject to the seniority provisions of the collective agreement. As it appears that the grievor has had the benefit of maintenance of earnings protection, an order for compensation does not appear necessary. If the facts are otherwise, that issue may be spoken to.

14 January 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR