

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3058

Heard in Montreal, Wednesday, 9 June 1999

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

The demotion of Mr. Yves Bossé from the position of Senior Telephone Sales Agent.

UNION'S STATEMENT OF ISSUE:

On November 21, 1997, Mr. Yves Bossé was demoted from his position of Senior Telephone Sales Agent to the position of Telephone Sales Agent. The position is governed by article 2.2 of the collective agreement. The Union's position is as follows: **1.** Mr. Bossé's demotion arose as a result of his union activities and is discriminatory and contrary to the provisions of article 27.17 of collective agreement no. 1. **2.** Article 2.2 of the collective agreement gives the Corporation the right to select an employee for the position of Senior Telephone Sales Agent but does not give the Corporation the right to de-select said employee without a "fair and impartial investigation" pursuant to articles 24.1 and 24.2. Mr. Bossé's demotion must be deemed to be discipline without an investigation and should be considered void *ab initio*. **3.** Notwithstanding items 1 and 2 above the Union argues that there was no basis for the demotion and that the Corporation cannot hide behind a non-disciplinary demotion for the purposes of avoiding the natural justice provisions of the collective agreement. Furthermore, the "non-disciplinary" demotion was unfair, unwarranted and discriminatory.

The Union requests that Mr. Bossé be reinstated to the position of Senior Telephone Sales Agent forthwith and that he be compensated for all lost wages and benefits.

CORPORATION'S STATEMENT OF ISSUE:

On November 21, 1997 Mr. Yves Bossé was removed from his position of Senior Telephone Sales Agent. The position is governed by article 2.2 of the collective agreement.

The Union contends that although article 2.2 of collective agreement no. 1 gives the Corporation the right to select an employee for the position of Senior Telephone Sales Agent, the Corporation cannot remove an employee without an investigation, pursuant to articles 24.1 and 24.2.

The Union also alleges a violation of article 27.17 of collective agreement no. 1 and sections 94.1 and 94.3 of the Canada Labour Code on the basis that Mr. Bossé's demotion arose as a result of his union activities.

The Corporation maintains that article 2.2 gives the right of selection for the Senior Telephone Sales Agent position, and the right to remove them from the position. The Corporation further contends that Mr. Bossé's removal from the 2.2 position was non-disciplinary in nature, and as such, the Corporation was under no obligation to hold an investigation.

The Corporation maintains that Mr. Bossé was removed from his position due to his performance, not his union involvement.

The Corporation maintains that the C.I.R.B. has exclusive jurisdiction to rule on alleged infractions of the Canada Labour Code.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:

(SGD.) B. E. WOODS
DIRECTOR, HUMAN RESOURCES & LABOUR RELATIONS

There appeared on behalf of the Corporation:

E. J. Houlihan	– Sr. Manager, Labour Relations, Montreal
C. Pollock	– Sr. Officer, Labour Relations, Montreal
L. Laplante	– Sr. Officer, Labour Relations, Montreal
J. Thérien	– Manager, Telephone Sales Office, Montreal
M. DiCarlo	– Director, Call Centres, Montreal

And on behalf of the Union:

D. Olszewski	– National Representative, Winnipeg
R. Massé	– Bargaining Representative, Montreal
D. Gagnon	– Local Chairperson, Montreal
Y-L Bossé	– Grievor

AWARD OF THE ARBITRATOR

The Union grieves the demotion of Mr. Yves-Laurent Bossé from his position of Senior Telephone Sales Agent at Montreal. The position in question is one which is filled at the discretion of the Company, without bulletin, pursuant to the terms of article 2.2 of the collective agreement. That article provides as follows:

2.2 The selection of a suitable employee to fill an opening in the following classifications shall be made from the employees without the necessity of bulletining and the appointment shall not be subject to appeal:

Secretary (those positions which fell within the scope of previous collective agreements)
Special Traffic Clerk, Vancouver
Special Traffic Clerk, Edmonton
Senior Counter Sales Agent (except those at Belleville, Halifax and Moncton, Sydney, Saint John, Campbellton, Truro and Charlottetown)
Senior Telephone Sales Agent

While filling any of the above positions, an employee shall retain his seniority in the group from which he was selected.

The parties are disagreed as to whether the demotion of Mr. Bossé was disciplinary or non-disciplinary. It is common ground that if his demotion was disciplinary, notwithstanding that it was from an article 2.2 position, the discipline and grievance procedures of article 24, including the right to a fair and impartial hearing prior to the assessment of discipline, would apply. The Corporation maintains, however, that its decision to demote Mr. Bossé was not taken for disciplinary reasons relating to culpable conduct. Rather, it submits that it was based on his demonstrated unsuitability for the position, as a result of a number of complaints and incidents related in evidence.

As a senior telephone sales agent Mr. Bossé was one of five employees in the Montreal Call Centre responsible for the direct assignment of work and supervision of a substantial number of telephone sales agents. Both the senior telephone sales agent position and the sales agent positions are within the bargaining unit. Additionally, at all times material to this grievance Mr. Bossé held the office of Union Steward. While there is some conflict in the evidence, it does not appear disputed that some discussion arose in September of 1997 between Mr. Mario DiCarlo, the then newly appointed director of the Corporation's Call Centres, and his union counterpart, Mr. Robert Massé, a full time representative responsible for the administration of the collective agreement at Montreal. Mr. Massé's evidence confirms that he had been approached by employees holding the position of telephone sales agent who questioned how Mr. Bossé could be both their immediate union representative and their supervisor, responsible for overseeing the proper performance of their work. Mr. DiCarlo's evidence is to the effect that when he first took office he was

told by a number of telephone sales agents that they were unhappy with Mr. Bossé's manner of communicating with them. While both Mr. DiCarlo and Mr. Massé believe that the other first raised the issue, it is clear that the matter of Mr. Bossé's dual functions was discussed between them in September of 1997.

The evidence also reflects that Mr. DiCarlo and Mr. Bossé had a discussion during the same month. According to Mr. DiCarlo's evidence, which the Arbitrator accepts as accurate, he shared with Mr. Bossé concerns expressed to him by telephone sales agents to the effect that the grievor was short-tempered in dealing with them, and sometimes provided them with inaccurate information. It appears that the two met again on at least two further occasions in late September and October, during which time at least one allegation of harassment of an employee by Mr. Bossé was discussed. As is evident from the evidence of Mr. DiCarlo, the director began to be concerned about the grievor's fitness to continue in the position of senior telephone sales agent by the time of their third meeting, in October.

It appears that Mr. DiCarlo's concern became somewhat aggravated by an incident during a meeting he held with all five senior telephone sales agents. The purpose of the meeting was to discuss the possibility of introducing an incentive system to improve productivity in the call centre. According to Mr. DiCarlo's testimony he had previously raised this issue with union representative Massé who was non-committal, indicating that the matter would have to be further discussed. When Mr. DiCarlo raised the issue with the senior telephone sales agents Mr. Bossé reacted very strongly. According to Mr. DiCarlo's account, which the Arbitrator accepts, upon his raising the issue Mr. Bossé immediately became furious, asserting that the matter must first be discussed with the Union. Mr. DiCarlo relates that the grievor then rose and left the room in anger, without giving him the opportunity to explain that he had previously raised the subject with Mr. Massé and wanted to explore it in a preliminary way with the senior telephone sales agents. Finally, as a result of what he perceived as a substantial degree of tension between Mr. Bossé and both the senior telephone sales agents, following the abortive meeting, and the telephone sales agents, he decided to remove Mr. Bossé from the position of senior telephone sales agent.

Upon a careful review of the evidence I am satisfied that the actions of the Corporation were taken for non-disciplinary reasons. On the material before me there is no substantial evidence of any misconduct or wrongdoing on the part of Mr. Bossé which could arguably have attracted discipline in the form of demerits, a suspension or any other penalty. What emerges is a pattern of problems with communication between the grievor and his peers. While it is true that some of the difficulties of communication related to some degree to the dual role played by the grievor as both a supervisor within the bargaining unit and a Union steward, I am satisfied on the material before me that there was no anti-union sentiment in the decision taken to demote Mr. Bossé. In that regard the Arbitrator accepts the evidence of Mr. DiCarlo which is essentially that he had no problem with the grievor holding both offices, but rather with his strident and confrontational way of communicating, an attitude which he construed as inconsistent with the proper discharge of the duties of a senior telephone sales agent.

Accepting, as I do, that the demotion of the grievor was non-disciplinary, the issue then becomes the standard to be followed by the corporation in implementing that decision. In that regard the Union's representative cites to the Arbitrator the following passage from the award of Arbitrator Beattie in **Keyano College and Keyano College Faculty Association** (1993) 34 L.A.C. (4th) 182 at p. 194 where the following appears:

We adopt the criteria set out by the board chaired by arbitrator Hope in the **Edith Cavell** award (above at p. 233) as being equally applicable to a demotion (whether based on culpability or non-culpability) as to a dismissal (based on non-culpability):

It is not open to an employer alleging a want of job performance to merely castigate the performance of the employee. It is necessary that specifics be provided. An employer who seeks to dismiss an employee for a non-culpable deficiency in job performance must meet certain criteria:

- (a) The employer must define the level of job performance required.
- (b) The employer must establish that the standard expected was communicated to the employee.
- (c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.
- (d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job and that

reasonable efforts were made to find alternate employment within the competence of the employee.

(e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

Even accepting that the above criteria are those which should be applied, the Arbitrator has some difficulty with the suggestion of the Union that the Corporation's actions stepped outside of the standards so described. While Mr. Bossé's initial evidence was to the effect that no shortcomings had ever been brought to his attention, he was somewhat contradictory on that issue in cross-examination. I am satisfied that, contrary to Mr. Bossé's evidence, there were several meetings between himself and Mr. DiCarlo over a number of weeks. During the course of those meetings Mr. DiCarlo made it clear to the grievor that he must improve his communications with other employees. I am satisfied that in the course of those encounters the standards expected and generally instruction as to how to meet those standards of communication were adequately communicated to Mr. Bossé. It would also appear that the grievor's performance, including actions such as those that gave rise to a charge of harassment against him, and his abrupt walking out of the senior telephone sales agents' meeting gave confirmation that his communication skills and short temper were unsuited to the requirements of his duties and responsibilities as a first line supervisor. In the result, I am satisfied that the Corporation, which in my view does bear the burden of proof, has discharged that onus in the case at hand, and has demonstrated objective reasons, taken in good faith, for its actions in the demotion of Mr. Bossé.

Nor can I draw any contrary conclusion based on the fact that the Corporation discussed the placement of Mr. Bossé following his demotion with Mr. Massé in the context of the application of article 12.19 of the collective agreement. That provision stipulates that an employee removed from his or her position as a disciplinary measure cannot assert a right to displace into the position of another regularly assigned employee. During the course of their discussion, Mr. DiCarlo specifically asked Union representative Massé to waive the application of that provision, there being no other apparent collective agreement article to deal with the return of Mr. Bossé to another position. Mr. Massé refused to do so. There is, at a minimum, a serious degree of contradiction between Mr. Massé who appeared unwilling to allow Mr. Bossé to bump into the position of a junior employee and the Union's representative at the hearing, who asserted that it is common past practice for employees leaving one bargaining unit position to be able to assert their seniority to bump into another. Whatever may be the correct position, I cannot find in the Corporation's actions with respect to this aspect of the evidence any indication that the grievor was in fact disciplined. Finally, for reasons articulated in **CROA 2157**, a dispute involving the same parties under the predecessor union (Canadian Brotherhood of Railway, Transport and General Workers), the issue of the grievor being "unjustly dealt with" is not arbitrable (see also **CROA 2939**).

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

June 14, 1999

(signed) MICHEL G. PICHER
ARBITRATOR

SUMMARY– CROA 3058

Senior Telephone Sales Agent Bossé – removed from “right of selection” position – union officer – evidence establishes unsuited for position – supervisor discussed job performance prior to demotion – no anti-union animus – unjustly dealt with not arbitrable (CROA 2157, 2939) – GRIEVANCE DISMISSED

KEYWORDS – CROA 3058

Non-culpable demotion right selection performance union office dismissed

VIA – CAW – June 9 1999 – award dated June 14 1999