

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4037

Heard in Montreal, Wednesday, September 14, 2011

Concerning

VIA RAIL CANADA INC.

And

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

EX PARTE

DISPUTE:

Rejection of candidacy of Benoit Dulong for locomotive engineer training.

UNION'S STATEMENT OF ISSUE:

Mr. Dulong submitted an application in response to a Locomotive Engineer Pilot Training Program bulletin, issued May 18, 2010. On July 12, 2010 he was advised that his candidacy was rejected. A grievance was filed. By letter dated August 12, 2010 Mr. Denis Roy advised the grievor that the reason for the rejection of his application was his non-conformity with one of the stated prerequisites, namely a "discipline free record".

The Union submits that the rejection of Mr. Dulong's candidacy was arbitrary and discriminatory. It further submits that the rejection for the stated reasons violated the March 2010 Memorandum of Understanding between the parties which established the Pilot Program and that it further violated article 27.17 of collective agreement #1.

The Union requests a declaration to the above effect and that the grievor be made whole in all respects including, where appropriate, the payment of compensation with interest.

The Corporation denies the Union's contentions.

FOR THE UNION:

(SGD.) A. ROSNER

NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

E. J. Houlihan	– Director, Labour Relations, Montreal
B. A. Blair	– Sr. Officer, Labour Relations, Montreal
J. Gough	– Director, Customer Experience, Montreal

There appeared on behalf of the Union:

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|----------------|--------------------------------------|
| A. Rosner | – National Representative, Montreal |
| S. Auger | – Regional Representative, Montreal |
| D. Andru | – Regional Representative, Toronto |
| F. Sauvé | – President for grievances, Montreal |
| M. Laframboise | – Union Representative, Montreal |
| B. Dulong | – Grievor |

AWARD OF THE ARBITRATOR

It is common ground that the parties entered into a Memorandum of Agreement in March of 2010 to establish a selection process and training as locomotive engineers for employees working outside the running trades under collective agreements no. 1, 2 and 3 between the Corporation and the Union. The prerequisites developed by the Corporation for the selection process included that an employee must have worked a minimum of five years with the Corporation and also that the employee have a discipline free record. The Corporation's interpretation of a discipline free record is that an individual should have no residual demerits or other discipline on his or her record for a calendar period of five years.

The grievor, who works as a hostler in Montreal, applied to be admitted to the training program. He was rejected from the selection process on the basis that he did not satisfy the prerequisite of a discipline free record. It is common ground that Mr. Dulong was disciplined on two occasions during his twenty-four years of service. Both of those instances involved what can fairly be characterized as personal misjudgement and gross misconduct. As related in **CROA&DR 3690**, Mr. Dulong, in the guise of working on a health & safety complaint, wrote a letter to a Corporation supervisor

insinuating that he is a sexual predator who attempts to seduce and fondle employees. That action resulted in twenty demerits which was reduced to written reprimand at arbitration based on the fact of the grievor having made a full apology.

The earlier discipline, discussed in **CROA&DR 3512**, involved the grievor issuing a voided ticket in the name of Osama Bin Laden and posting it on the Union's bulletin board to the attention of employees and managers in the work place. He apparently did so as his means of bringing to general attention what he saw as the security issue of the Corporation not demanding sufficient proof of identity upon the sale of a ticket. The assessment of thirty demerits made by the Corporation was reduced by the Arbitrator to fifteen demerits.

It is not disputed that by the operation of the Brown System the grievor still had residual discipline on his record within the five year period preceding his application for selection in the pilot program of locomotive engineer training. In his case the entire removal of discipline from his record had not occurred at the time of his application, as he had been discipline free for some four years and ten months.

The Corporation takes a two-fold position. Firstly it notes that Mr. Dulong did not clear the five year period of being discipline free. Alternatively, its representative argues that the Corporation nevertheless at all times reserved the right to go behind the five year period where the nature of the conduct which attracted discipline was sufficiently serious as to disqualify an individual from selection.

The Union's representative relies on prior awards of this Office (**CROA 3107 and 3662**) in support of his submission that the denial of selection of the grievor was arbitrary and discriminatory on the facts disclosed. The Union stresses that the arbitrator in the noted awards found that an element of arbitrariness and unreasonableness was disclosed where stale-dated discipline was given undue weight.

While the Arbitrator appreciates the perspective of the Union, it is trite to say that each case must be determined on its own facts. In **CROA 3107** the following comment appears:

... While it is not improper for the Corporation to scan the grievor's record over a greater number of years, particularly with a view to identifying recidivism in a particular area, no significant recidivism in elements critical to the grievor's qualifications as a candidate for training as a locomotive engineer emerge from the record. ...

As is evident from the foregoing passage, it is appropriate for the Corporation to scan an employee's disciplinary record, and to do so over a relatively long period, to determine whether there are recidivist tendencies or traits which would militate against the selection of that individual.

Regrettably, in my view, this is such a case. While it is true that the grievor has been disciplined only twice, both instances involved what can be fairly characterized as gross errors of judgement calculated to cause scandal or embarrassment to the Corporation. The most recent of those instances was adjudicated in 2008, albeit the event occurred in 2004.

The establishing of a pilot project for the training of locomotive engineers is a project of considerable importance and cost to the Corporation. In judging the fitness for selection of candidates, in my view, the employer must be allowed a substantial degree of discretion. If it is shown that it has taken pertinent factors into consideration and has avoided arbitrariness, discrimination or bad faith in its treatment of an applicant, a board of arbitration should not interfere with that judgement, even though it might have itself decided otherwise.

What does the instant case disclose? The record confirms that on two separate occasions in the past Mr. Dulong engaged in deliberate behaviour which was clearly provocative, hurtful to supervisors and scandalous to the point of risking public embarrassment for the Corporation. Unfortunately his penchant for recklessness and indifference to the impact of his actions did have a recidivist quality. The Corporation's judgement of the grievor's character based on those events, and his suitability for locomotive engineer training did, in my view, allow it to carefully weigh the history of those incidents in the grievor's disciplinary record and to come to the conclusion that these incidents demonstrated an incompatibility on the grievor's part with respect to the attribute that would justify his selection for locomotive engineer training. Given that the Corporation's decision was in fact based on examining discipline beyond the five year window, I find it unnecessary to deal with the dispute between the parties concerning the meaning of an employee's record being free of discipline for the purposes of the

selection process. As indicated above, I am satisfied that the recidivism exhibited by the grievor in matters of serious misconduct justified the Corporation's decision.

For these reasons the grievance must be dismissed.

September 22, 2011

(signed) MICHEL G. PICHER
ARBITRATOR