# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 3662

Heard in Montreal, Tuesday, 8 April 2008

Concerning

**VIA RAIL CANADA INC.**

and

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

**DISPUTE:**

Eligibility for In-Charge selection process on behalf of Messrs. Rodney Barnett and Andrew Mills.

**JOINT STATEMENT OF ISSUE:**

Messrs Barnett and Mills were denied access by the Corporation to the In-Charge selection process as they did not meet at least one of the prerequisites. Both employees had discipline on their record within the last five years.

The Union finds the Corporation's position to be arbitrary and discriminatory. The Union cites a violation of article 27.17 of the collective agreement. The Union further agues that the Corporation's policy amounts to a double jeopardy regarding the initial discipline, and is unreasonable in the circumstances.

The Corporation maintains that the selection process criteria to establish the suitability for the In-Charge position were respected in accordance with the collective agreement.

The Corporation did not, therefore, engage in a discriminatory practice in breach of article 27.17 of the collective agreement.

| FOR THE UNION: | FOR THE CORPORATION: |
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| (SGD.) D. OLSHEWSKI | (SGD.) B. A. BLAIR |
| NATIONAL REPRESENTATIVE | SENIOR ADVISOR, LABOUR RELATIONS |

There appeared on behalf of the Corporation:

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| B. A. Blair | – Sr. Advisor, Labour Relations, Montreal |
| T. Kahnert | – Manager, Customer Experience, Toronto |
| J. Rondeau | – Agent, Labour Relations, Montreal |
| D. Stroka | – Labour Relations Advisor, Montreal |
| M. St-Jacques | – Adminstrator, Labour Relations, Montreal |
| A. Richard | – Labour Relations Advisor, Montreal |

And on behalf of the Union:

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| D. Olshewski | – National Representative, Winnipeg |
| R. Fitzgerald | – President, Council 4000, Toronto |
| D. Andru | – Bargaining Representative, CAW Ontario, Toronto |
| S. Auger | – Bargaining Representative, CAW Quebec, Montreal |

## AWARD OF THE ARBITRATOR

As is evident from the joint statement of issue, the Union objects to what it deems to be an arbitrary and discriminatory policy put forward by the Corporation. It objects to the Corporation allegedly denying to employees the opportunity to interview for a promotion if the employee should have any discipline on his or her record in the previous five years.

The Union's concern is quite understandable. Grievor A. Mills received a letter from Corporation management, dated May 31, 2007 explaining to him why he was rejected for consideration, prior to the interview stage. That letter, authored by Manager, Customer Experience of Union Station in Toronto, Ms. Theresa Kahnert, reads as follows:

> Dear Andrew:
>
> We acknowledge receipt of your application for the In-Charge position and we thank you for your interest.
>
> A preliminary review of the applications received was made in order to identify which candidates possessed the minimum requirements for the position. This screening also includes a minimum of 5 concurrent years prior to the interview date, which are free of demerits. Unfortunately, based on our Human Resources records, you do not meet this criterion.
>
> We thank you for your interest in this position, and wish you success in your future endeavours.
>
> Sincerely yours,
>
> (sgd.) Theresa Kahnert
> Manager, Customer Experience
> Union Station, Toronto

The grievor's record contained a letter of reprimand in relation to attendance issues, dated August 8, 2005. Therefore, on June 8, 2007, Ms. Kahnert sent a correcting letter to the grievor which reads, in part, as follows:

> Thank you for your letter concerning your In Charge application. I apologize for the incorrect use of the phrase "five (5) demerit-free years". The letter should have stated "five (5) discipline free years".
>
> Enclosed please find a copy of the discipline measure form from your personal file which clearly states that you received formal discipline (discipline no. […]) from Manager Kirk Duguid on August 8, 2005.
>
> Therefore no review of your application for In Charge training will be considered.

Remarkably, and apparently only at the arbitration hearing stage, the Corporation has adopted a position which amounts to a reversal of the position asserted by Ms. Kahnert. To all outward appearances, the position expressed by Ms. Kahnert would indicate to the Union that any discipline whatsoever, over a five year period, would automatically disqualify an employee from the possibility of an interview for promotion to an In Charge position. That, understandably, caused the Union substantial concern and prompted this grievance, brought not only on behalf of Mr. Mills, but also on behalf of employee Rodney Barnett. Mr. Barnett was also denied an interview, as explained in a letter authored by Ms. Lesley Kim Cowan, Manager Customer Experience of the Toronto Employee Service Centre dated July 23, which simply restated the "rule" to the effect that an employee "… must be five years free of discipline" to be eligible for an interview for promotion. Mr. Barnett received twenty demerits for insubordination on March 28, 2002. On that basis he was denied an interview for promotion to an In Charge position.

Before the Arbitrator, and only after the Union's presentation of its case, the Corporation's representative in fact asserted an entirely different position from that which caused the grievance, and the effort and expense which it involved, to come before this Office. According to her explanation, in fact what the Corporation does is to examine the discipline of the employee over a period of five years, and indeed to examine his or her entire employment file, including non-disciplinary notations, such as records with respect to attendance and the like, in coming to an ultimate decision as to the suitability of that person for the promotion being considered. To put it bluntly, higher management distanced itself dramatically from the position asserted by Ms. Kahnert and Ms. Cowan, notwithstanding that Ms. Kahnert, who was in attendance at the hearing, appeared to have some difficulty in

understanding the distinction between the hard and fast rule which she communicated to Mr. Mills, and the broader and more flexible rule which the Corporation maintains is the approach which it takes.

With respect to the letters written by Ms. Kahnert and Ms. Cowan, the Arbitrator is compelled to agree with the Union. They would plainly represent an arbitrary and discriminatory rule as regards entitlement to a promotion interview. At the most obvious level, such a rule could not apply equally, to the extent that newly hired employees with less than five years' working experience, who are nevertheless entitled to apply for promotions, would have a substantially shorter period of employment reviewed for the purposes of automatic elimination than might an employee, such as Mr. Barnett, with twenty years' service and relatively long-dated discipline on his record. This Office has had previous occasion to comment on the limited value of stale dated discipline (see **CROA 3107**).

It is obviously open to the Corporation to develop policies to be applied in the job bulletin and promotion process. It is obviously within its general prerogatives to establish the criteria for qualification. Its discretion in that regard is, however, somewhat limited, to the extent that the qualifications it adopts must not be arbitrary, discriminatory or bear no meaningful relation to the duties and responsibilities of the position in question.

To the extent that the grievance challenges the letters drafted by Ms. Kahnert and Ms. Cowan, it must succeed. The Arbitrator declares that their assertion that any disciplinary record within a five year period disqualifies an employee from any promotion interview is plainly arbitrary, as it would appear to bring to bear discipline for events or conduct which might well bear no relation to the job duties and responsibilities in relation to the position being applied for. It would also, as indicated above, be of clearly unequal application to the extent that it would favour junior employees, with substantially less than five years' service, and a commensurately reduced probability of having any discipline on their record.

That, however, does not entirely dispose of the grievance. As suggested above, it remains the discretion of the Corporation, in determining the suitability of candidates for promotion, to look to the employment record of those individuals in the broadest sense, with regard to both disciplinary and non-disciplinary notations, to assess their qualification for the promotion in question. In the instant case, as noted in the material presented by the Corporation, Mr. Mills bears an extensive record of non-disciplinary notations with respect to both attendance and lateness and the failure to observe proper dress codes. The record of those notations extends over a substantial period of time, including weeks and months in close proximity to the job bulletin. Can it be said that the Corporation was not entitled to take those factors into account? I think not. The Arbitrator accepts the representation of the employer that it did have regard to those elements of the grievor's employment file, and on that basis denied him the opportunity for an interview for the promotion. It formed the opinion, in other words, that his serious difficulties with respect to attendance, and his occasional problems with dress, were not acceptable in a candidate for an In Charge position. In the Arbitrator's view, that view was arrived at reasonably, and it should not be disturbed.

The same must be said of the rejection of Mr. Barnett. While in the Arbitrator's view it is open to question as to whether an incident of insubordination dating back some five years should be held against an individual who has no subsequent recurrence of that misconduct, in the Corporation's view Mr. Barnett's record of insubordination was such as to disqualify him from the promotion. This is obviously an issue upon which reasonable people can have differing views. In the Arbitrator's view it is important to respect the Corporation's opinion, to the extent that it was arrived at in good faith, and without arbitrariness or discrimination. I am satisfied that that is so.

The grievance is therefore allowed in part. The Arbitrator finds and declares that the position expressed by the Corporation's management in the form of the letters of Ms. Kahnert and Ms. Cowan are contrary to the collective agreement, to the extent that they would introduce an element of arbitrariness and discrimination in the promotion process, if indeed no regard were had to the actual nature of the discipline incurred over a five year period. However, the very different position expressed by the Corporation at the arbitration hearing is not contrary to the collective agreement, to the extent past discipline is used only if it is in some manner pertinent to the duties and responsibilities of the position being applied for. Further, for the reasons noted above, no further remedy should apply as regards Mr. Mills and Mr. Barnett, it being established that the Corporation did apply its mind to their qualifications and specifically found that the past instances of discipline and counselling in which they were involved demonstrated incompatibility with promotion to the In Charge position.

April 14, 2008

**(signed) MICHEL G. PICHER**
**ARBITRATOR**