CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4097VIA

Heard in Calgary, Wednesday 14 March 2012

concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA – COUNCIL 4000

DISPUTE:

The assessment of 20 demerit marks against Mr. M. States for his failure to successfully complete the four weeks of refresher training upon his return to work on his permanent position which resulted in his discharge for accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

The grievor had been absent from March 7, 2008, part of which for which he received Workers Compensation benefits. In May of 2011, working with his case manager from the Workers Compensation Board of Nova Scotia, the grievor made it known that he wished to come back to work on one of three positions: (1) Senior Service Attendant Baggage; (2) Station Attendant / Senior Station Attendant; (3) Station Attendant.

The Corporation declined the return to work suggestion and by way of a letter dated June 7th, 2011 ordered the grievor to report to his pre-accident position of Telephone Sales Agent. However, when he reported for the pre-accident position he was not placed on it. Rather he was placed in a training course which he did not pass.

The Union contends that failing to successfully complete training should not attract discipline and that the Corporation failed to make prima facie case of intentional failure to successfully complete the training. The Union further contends that the Corporation's actions in this case are arbitrary, discriminatory and contrary to articles 24 and 27 of Agreement 1 and the *Canadian Human Rights Act*.

The Union seeks reinstatement with full employment, without loss of seniority and reimbursement for all lost wages and benefits.

FOR THE UNION:

(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:

(SGD.) B. A. BLAIR
SR. OFFICER, LABOUR RELATIONS

There appeared on behalf of the Corporation:
B. A. Blair – Sr. Officer, Labour Relations, Montreal
C. Morrison – Manager, Telephone Sales, Moncton

And on behalf of the Union:
R. Fitzgerald – National Representative, Toronto
M. States – Grievor

AWARD OF THE ARBITRATOR

The grievor was discharged from his employment on or about July 28, 2011. At that time he was awarded twenty demerits for what the Corporation concluded was his deliberate and fraudulent failure to properly complete his refresher training following his return to work, after an extended absence, on June 13, 2011.

Certain of the facts concerning the grievor's employment and attendance record are referred to in **CROA&DR 4096**. Suffice it to say that following on-duty shoulder injuries in 1996 the grievor was accommodated by being placed in a Telephone Sales Agent's position at Moncton. While he retained that position for a number of years, commencing March 7, 2008 he was absent from work until his return on June 13, 2011. As appears from a Nova Scotia Workers Compensation appeals tribunal decision dated April 30, 2010, the grievor received temporary earnings replacement benefits for various periods commencing in 2008 and ultimately ending on or about June 10, 2011, at which point the grievor was compelled to return to work.

The Corporation notes to the Arbitrator that the grievor has an extensive record of absenteeism, having been effectively absent, in addition to the time reflected above, through 2005, 2006, 2008, 2009, 2010 and 2011 to the date of his return in June of that

year. In addition to his shoulder injuries, he also appears to have had medical problems in relation to carpal tunnel syndrome, coronary problems and certain difficulties with drugs.

It is amply evident from the material before me that the grievor never wanted to work in Moncton. That is clear from his own statements found in the documentation submitted in respect of a complaint which he filed under the **Canadian Human Rights Act**, alleging discrimination against him on the basis of race and his disability. While his original transfer to the accommodated position at Moncton in 1996 was by agreement between the Corporation and the grievor's Union, in the documentary evidence before me he has asserted that that was against his wishes. However, that arrangement was never grieved and appears to be consistent with an employee's obligation to accept reasonable accommodation.

As noted above, it appears that Mr. States' income replacement through Workers Compensation effectively expired on June 10, 2011. It is at that point that he returned to his permanent position at Moncton, as a Telephone Sales Agent, on or about June 13, 2011. The material before the Arbitrator confirms, beyond substantial dispute, that the position to which the grievor returned in 2011 was substantially the same as the job he left in March of 2008. It appears that the only new element in the duties of the job involved the processing of VISA credit purchases, said to be a relatively minor adjustment.

The evidence of the Corporation, which I accept, is that Mr. States was given a period of orientation and an opportunity to re-familiarize himself with the processes of the workplace. It appears that as part of that exercise he was called upon to handle one or more telephone calls. When he exhibited substantial difficulty in doing so, the decision was taken to have him undergo entry level training, the same as is given to newly hired employees. The unchallenged evidence of the Corporation is that the failure rate for that training is generally no higher than 15%, and that a class of seven new employees had then recently been trained, all successfully achieving the minimum passing grade of 80%.

During the refresher training the grievor was assigned the assistance of Trainer Ms. Stella Maillet. Over a number of days she worked on exercises with Mr. States. The record confirms that during the grievor's first two weeks back to work he failed some five evaluations, registering scores of 74%, 71%, 13%, 49% and 44%. Subsequent evaluations yielded results as low as 0%, 8% and 7%. In effect, the evidence reveals that the grievor, who performed the duties and responsibilities of the Telephone Sales Agent's job for a number of years commencing in 1996, was unable to achieve a passing mark in the entry level training for that same job on twelve separate tries at the test, between June 13 and July 8, 2011.

The Corporation maintains that those failings by the grievor were deliberate, and were part of a fraudulent attempt on is part to enable him to seek accommodated work in a location other than Moncton. When questioned at the arbitration hearing, Mr.

States maintains that he was extremely nervous, and that his ability to perform well on the tests was dictated by the fact that he was disturbed that two other employees returning to work were simply given refresher orientation and not required, as he was, to undergo the tests.

Following an investigation, the Corporation concluded that the grievor did deliberately underperform on the tests as a result of which it assessed twenty demerits against his record. The issue in this arbitration is whether that discipline was merited. The assessment of twenty demerits, coupled with the grievor's prior disciplinary standing of fifty-five demerits, led to the termination of his services for having seventy-five total demerits, being fifteen above the dismissable level of sixty.

The Corporation's representative submits that Mr. States has conducted himself as an uncooperative and ultimately ungovernable employee. Regrettably, the Arbitrator is compelled to agree with that unfortunate assessment. While it appears that there is little doubt that the grievor did not want to work in Moncton, and that, as he stresses, he was not on good terms with the manager of Telephone Sales at that location, Mr. Curtis Morrison, those elements do not, in my view, persuasively explain the grievor's abject failure to reintegrate into the position which he held at Moncton for a substantial number of years. As an employee holding an accommodated position, in accordance with the provisions of article 15 of the collective agreement, and of the understanding between the Corporation and the Union, he could not exercise his seniority to bid on work other than his accommodated position. In my view, having regard to all of the objective facts,

the only rational understanding of the grievor's conduct is that he engaged in an attempt to manipulate the system so as to disqualify himself from the only available accommodated position at Moncton, in an effort to secure alternate employment with the Corporation in Halifax. There is no medical or psychological evidence placed before the Arbitrator to give any other explanation for the grievor's failure to pass the entry test for a job which he had performed without difficulty for many years.

Can it be said that Mr. States, who is a black person, was in fact discharged by reason of discrimination based either on his race or on his disability, contrary to the prohibitions contained **Canadian Human Rights Act**? I think not. The evidence confirms that for years the Corporation accommodated the grievor's injuries and medical disabilities, most obviously by arranging for him to work in a sedentary position at Moncton following his compensable, on the job, injuries in 1996. Nor is there anything on the record before me to suggest that this employee of thirty years' standing was treated unfairly or discriminated against by reason of his race or cultural background. What the evidence discloses, very simply, is that when the Workers Compensation Board of Nova Scotia confirmed that the grievor was fit to perform the duties of the Telephone Sales Agent in June of 2011, and that he should return to work at Moncton, he effective refused to accept that outcome and manipulated events so as to avoid it. I am compelled to agree with the assessment of the Corporation that he did so fraudulently, and in such a way as to break the bond of trust between himself and his long-time employer.

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

March 19, 2012

MICHEL G. PICHER
ARBITRATOR