CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2235
Heard at Montreal, Tuesday, 10 March 1992
concerning
VIA RAIL CANADA INC.
and
CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS
EX PARTE
DISPUTE:
Mr. R. Ouellette, spareboard employee, forced on position for which not qualified, resulting in reduction of earnings.
BROTHERHOOD'S STATEMENT OF ISSUE:
Mr. R.A. Ouellette, a spareboard employee, was protecting ``Service Manager''. On September 30, 1990, he was called for the position of Assistant Service Co-Ordinator, for which he was not ``fit or able'' (qualified). As a result, he lost a trip and further earnings thereafter.
The Corporation was fully aware that Mr. Ouellette did not have the fitness and ability to perform the work of an ASC as is a requirement in Articles 7, 12, and 13 and Agreement No. 2.
The Brotherhood further contends that the Corporation was in violation of Appendix 7 and the Human Rights Act.
The Corporation fails to see any violation of the Collective Agreement and believes the dispute is not arbitrable.
FOR THE BROTHERHOOD:
(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT
There appeared on behalf of the Corporation:
D. S. Fisher
Senior Officer, Labour Relations, Montreal
M. St-Jules
Senior Negotiator & Advisor, Labour Relations, Montreal
C. Pollock
Senior Officer, Labour Relations Montreal
J. R. Kish
Senior Advisor, Labour Relations, Montreal
And on behalf of the Brotherhood:
G. T. Murray
Regional Vice-President, Moncton
R. Ouellette
Grievor

AWARD OF THE ARBITRATOR

The Arbitrator must accept the preliminary objection to the arbitrability of this grievance raised by the Corporation. The instant collective agreement, like others in the non-operating sector of the railway industry, makes a distinction between grievances by an employee relating to the interpretation, application or alleged violation of the collective agreement, on the one hand and a complaint that the employee has been unjustly dealt with, on the other hand. The instant collective agreement provides, in part, as follows:

24.21

Any complaint raised by employees concerning the interpretation, application or alleged violation of this Agreement or that they have been unjustly dealt with shall be handled in the following manner:

Step 1

Within 21 calendar days from cause of grievance or complaint employees and/or the Local Chairperson must present the grievance or complaint in writing to the immediate supervisor who will give a decision as soon as possible but in any case within 21 calendar days of receipt of grievance.

Step 2

Within 28 calendar days of receiving decision under Step 1, the Regional Vice-President and/or Accredited Representative of the Brotherhood may appeal the decision in writing to the Field Manager, On-Board Services who will render a decision within 28 calendar days of receiving appeal. The appeal will include a written statement of the grievance and where it concerns the interpretation or alleged violation of the Collective Agreement the statement will identify the Article and paragraph involved.

Step 3

Within 60 calendar days of receiving decision under Step 2, the National Vice-President of the Brotherhood may appeal the decision in writing to the Director, Labour Relations who will render a decision within 60 calendar days of receiving appeal.

25.1

Provision is made in the following manner for the final and binding settlement, without stoppage of work, of differences or disputes, including personal grievances, which arise concerning the application or interpretation of this Agreement governing rates of pay and working conditions, which cannot otherwise be disposed of between officers of the Corporation and the Brotherhood.

25.2

A grievance concerning the interpretation or alleged violation of this Agreement or an appeal by an employee that he has been unjustly disciplined or discharged and which is not settled at Step 3, may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work in accordance with the regulations of that office.

[emphasis added]

As is apparent from the foregoing, it is only a grievance concerning the interpretation or alleged violation of the collective agreement, or against an alleged unjust measure of discipline or discharge which may be referred to this Office for arbitration. The more general complaint of an employee that he or she has been ``unjustly dealt with'' in a manner unrelated to the collective agreement is, in accordance with Article 24.21 of the collective agreement, limited to being heard through the first three steps of the grievance procedure, and may not, by the agreement of the parties, proceed to arbitration.

This is a long recognized practice in the industry. Needless to say any contrary interpretation would open the arbitration process to each and every complaint of an employee who might feel unjustly dealt with in a myriad of ways entirely unrelated to the rights and obligations circumscribed by the collective agreement. For obvious reasons, grounded in the rational administration of the grievance procedure and arbitration system, an interest vital to unions and employers alike, no such right has ever been established either by statute or by contract in the realm of reported industrial relations in Canada. Before finding that the parties intended that employees should have unlimited access to arbitration over issues unrelated to their collective agreement, such as the location of their lockers, the size of their parking space or the height of their chair, on the basis that they have been ``unjustly dealt with'', an arbitrator must find clear and unequivocal language to support such an extraordinary result.

The same is true in respect of the jurisdiction of this Office as described in the Memorandum of Agreement dated January 7, 1965 (as amended and renewed) which provides, in part, as follows:

4.

The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;

(A)

disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and

(B)

other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration for final and binding settlement by arbitration;

but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this Agreement.

Similarly, Section 57 Part I of the Canada Labour Code which deals with the right to proceed to arbitration, limits its application to matters concerning the interpretation, application, administration or alleged contravention of the terms of a collective agreement. It provides as follows:

Every collective agreement shall contain a provision of final settlement without stoppage of work, by arbitration or otherwise of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

It is well settled in the jurisprudence of this Office that complaints with respect to an employee having been ``... unjustly dealt with ...'' under the collective agreement at hand are not arbitrable, to the extent that they do not also allege a violation of a provision of the collective agreement (see e.g. CROA 924 and CROA 2157).

The gist of the Brotherhood's complaint with respect to the treatment of the grievor is that it was unjust for the Corporation to deprive him of the opportunity to work as a Service Manager, a position which could have been more readily performed by him given his medical limitations. The evidence establishes, without contradiction, that the grievor's seniority was insufficient to gain him a position on the service managers' spareboard. Moreover, there was no attempt to obtain preferential treatment for the grievor, because of his medical disability, by the Brotherhood under the terms of Appendix VII of the collective agreement. In the result, while the Arbitrator is sympathetic to the unfortunate plight of Mr. Ouellette, the evidence discloses no violation of his rights under the collective agreement. Nor can the Arbitrator find that there has been discriminatory treatment of Mr. Ouellette, who was at all times dealt with in accordance with the terms of the collective agreement and the established practice in Atlantic Canada. This appears to differ from the treatment of employees in VIA Quebec, where the practice is in accordance with a separate local agreement specifically negotiated between the parties and limited to that location.

Lastly, the Arbitrator can see no violation of the Canadian Human Rights Act in the treatment of Mr. Ouellette, even assuming that I have jurisdiction to deal with that matter. The evidence discloses that the grievor's maintenance of earnings were reduced in respect of those periods of assignment which he was unable to accept because of illness. That treatment is consistent with the treatment of all employees under the collective agreement who are absent for illness, and cannot be said to be discriminatory. Putting the matter differently, the Corporation is justified in its view that being physically fit and able bodied is a bona fide occupational requirement of On-Board Service. In the circumstances, absent the agreement of the Brotherhood under the terms of the Appendix VII, the Corporation had no latitude to change the grievor's classification in disregard of the seniority rights of other employees.

For all of the foregoing reasons the Arbitrator finds that the grievance is not arbitrable, and in the alternative, that no violation of the collective agreement, no discriminatory practice and no departure from the requirements of the Canadian Human Rights Act is disclosed. For these reasons the grievance must be dismissed.

March 13, 1992

(Sgd.) MICHEL G. PICHER

ARBITRATOR