CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3059
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 - UNION:

Whether or not the Corporation could unilaterally implement an incentive program at the Montreal Telephone Sales Office.

UNION'S STATEMENT OF ISSUE:

In late 1997, the Corporation implemented an incentive program at the Montreal Telephone Sales Office. The program provided for time off work with pay for employees who reached various levels of productivity.

It is the Union's position that the Corporation was in violation of article 2.1 of collective agreement no. 1 when it changed working conditions without bargaining same. It is further the Union's position that the incentive program is nothing more than a private contract with the employees of the Montreal Telephone Sales Office.

The Union requests that the Corporation cease the incentive program forthwith.

DISPUTE - CORPORATION:

Whether the implementation of the incentive program by the Corporation is a violation of articles 2.1 of the collective agreement and sections 94.1 of the Canada Labour Code.

CORPORATION'S STATEMENT OF ISSUE:

In late 1997, the Corporation implemented an incentive program at the Montreal Telephone Sales Office (TSO). The program provided for time off work when employees reached various levels of productivity.

The Union alleges that the Corporation was in violation of Section 94.1 of the Canada Labour Code as well as article 2.1 of collective agreement no. I when it changed working conditions without bargaining them.

As such the Union is requesting that the Corporation cease the incentive program.

The Corporation does recognize the Union as the sole bargaining agent with respect to wages, hours of work and other working conditions for the employees at the Montreal TSO, however, the Corporation maintains that the incentive program does not offend this recognition.

The Corporation has the right to set standards of performance in the TSOs. The incentive program is a voluntary recognition by the Corporation of the employees attaining the prescribed standard of performance.

The Corporation maintains that the C.I.R.B. has the exclusive jurisdiction to rule on Section 94.1 of the Canada Labour Code.

FOR THE UNION:
(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE
FOR THE CORPORATION:
(SQ13.) 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. Thdrien	-	Manager, Telephone Sales Office, Montreal
M. DiCarlo	-	Director, Call Centres, Montreal

And on behalf of the Union:

D. Olshewski	National Representative, Winnipeg
R. Massd	Bargaining Representative, Montreal
D. Gagnon	Local Chairperson, Montreal
Y-L Boss45	Observer

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. On September 26, 1997 the Corporation's Director of Call Centres, Mr. Mario DiCarlo, issued a memo to Call Centre personnel. The memo advised employees of an upward revision of productivity standards, to finally achieve a level of 84% in December of 1997. He further indicated that incentive programs would be implemented to reward employees who exceed the productivity standard.

Shortly thereafter employees in the Montreal Call Centre were presented with a ballot of employee candidates who would represent them in discussions to establish the form of incentive program which would be most acceptable to employees. The seven candidates for the four positions in question were apparently chosen by management, with ballots to be returned by October 27, 1997.

Late in 1997 the incentive program went into effect. Under the terms of the program employees are awarded points for their performance in four areas:

- Post-call processing time,
- attendance and punctuality,
- the quality of their calls (including attitude demonstrated during calls, accuracy of information, politeness and proper closing),
- productivity, meaning the time logged by an employee as being in and available to receive calls.

In accordance with a specific point system employees accumulate point credits which can ultimately be exchanged for paid time off. It appears that the maximum amount of paid time off which an employee could achieve under the system would be thirty hours in one year.

None of the above initiatives was negotiated with or approved by the Union. While it appears that the Union was given information as to the proposed program, it declined to participate in its establishment and opposed its implementation. In November of 1997 it filed the instant grievance as an ultimate protest, along with a complaint to the Canadian Industrial Relations Board separately alleging an unfair labour practice on the part of the Corporation. It appears that in light of the Union's position the Corporation has delayed implementation of the incentive program at its call centres in Toronto and Moncton.

The Union asserts that the Corporation's actions are in violation of the collective agreement, the terms and conditions of which it submits are intended to be exhaustive as to the hours of work and other working conditions of all employees. In that regard it cites to the Arbitrator the

language of article 2.1 of the collective agreement which reads as follows:

> 2.1 The Corporation recognizes the National Automobile, Aerospace, Transportation and General Workers Union of Canada as the sole bargaining agent with respect to wages, hours of work and other working conditions for all classes of employees recognized by the Canada Labour Relations Board certification order dated January 25, 1985, as wen as equipment maintenance employees in the classifications represented by the Union.

Mr. DiCarlo rejected the Union's grievance in a letter dated November 14, 1997 which reads, in part, as follows:

> Concerning the incentive programs, they aren't only aimed at increasing the productivity standards but also the different aspects of the work performed by our colleagues, such as the quality, the revenues, etc. According to me, it is imperative to recognize people that reach a higher productivity standard and the Agents seem to appreciate that type of program.
>
> Therefore, your grievance is respectfully declined.

The gist of the Union's complaint does not relate to whether the incentive program is good for business or popular among the employees. Rather its objection is more fundamental, namely that the incentive program is about wages and hours of work, and was entirely negotiated with bargaining unit employees without the involvement of the Union and implemented without the Union's agreement, outside the terms of the collective agreement. Unfortunately, whether by ignorance or design, the actions of the Corporation undertaken by Mr. DiCarlo are plainly unlawful, and contrary to the terms of the collective agreement. Article 2.1 of the collective agreement is part of a contractual document enforceable under the Canada Labour Code. By its terms the Corporation has duly recognized the Union as the sole and exclusive agent for the purposes of bargaining and establishing wages, hours of work and "other working conditions" for all employees within the bargaining unit. By any interpretation, and assuming the best of good faith, the process followed by Mr. DiCarlo in independently selecting employee representatives, discussing with them the terms of an incentive program for wages in the form of paid time off for exceeding certain performance standards, and implementing the program can only be characterized as a denial of the Union's exclusive right of representation under article 2.1 of the collective agreement.

The rights asserted by the Union in this grievance are among the most basic and important in collective bargaining. This Office has had a number of prior occasions to consider similar issues. In **CROA 2712** the arbitrator considered an arrangement whereby the Quebec North Shore and Labrador Railway made individual agreements with students hired for the summer, exacting undertakings from them that they would terminate their employment at the end of the summer season to return to their studies. When a student employee whose plans changed was dismissed contrary to his own wishes at the end of the season, the union carried a grievance on his behalf claiming, in part, that the arrangement negotiated individually with the student employees was in violation of the representation rights of the union and the terms of its collective agreement. This Office sustained the grievance, commenting in part as follows:

> The Arbitrator cannot accept the position pleaded by the Employer. As indicated by Counsel for the Union, it is well established in Canadian labour relations law that when a union is accredited as the sole bargaining agent for all employees in a bargaining unit, and when a collective agreement is in place, it is no longer possible for the employer to negotiate separate contracts, on an individual basis with employees, where those contracts stipulate terms and conditions of work other that those which are found in the collective agreement.

That principle, so fundamental to the regime of labour relations, was commented upon by the Supreme Court of Canada in Syndicat catholique des employés de magasins de Qu6bec Inc. c. Cie Paquet Lt6e, [1959] R.C.S. 206 (Judson J.) at page 212:

> ... There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the Collective Agreement, freedom of contract between master and individual servant is abrogated. ...

(See also: Canadian Pacific Railway Co. v. Zambri, [19621 R.C.S. *(Judson J.) 609* at p. 624, McGavin Toastmaster Company v. Ainscough, *(1975) D.L.R. 1 (Judson J.) at p. 6, and* General Motors v. Brunet, [197712 R. C. S. 53 7 *at p.* 549.)

(translation)

This Office has also struck down arrangements separately negotiated with employees to pay for their own medical examinations **(CROA 1576),** and to undertake certain courses on their own time as a condition of employment **(CROA 1959).** It is well established in the jurisprudence of this Office that, absent any contrary provision within the terms of a collective agreement, there is no latitude for an employer to individually negotiate terms and conditions of employment, including wages, with individual employees (see also **CROA 2384).** Nor can it unilaterally impose working conditions, wage arrangements or benefits inconsistent with those in the collective agreement, although it may obviously do so with the concurrence of the Union.

On the basis of the facts presented, and the clear preponderance of the Canadian jurisprudence, I am satisfied that in the case at hand the Union has succeeded in establishing that the Corporation violated article 1.2 of the collective agreement, as well as the general scheme of the agreement with respect to hours of work, wages and conditions of employment, by its unilateral implementation of the employee incentive program commencing in November of 1997. 1 so declare, and retain jurisdiction to consider further remedial directions should the parties be unable to reach agreement in that regard.

June 14, 1999

MICHEL G. PICHER
ARBITRATOR