CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3107
Heard in Montreal, Thursday, 13 April 2000
concerning
VIA RAIL CANADA INC.
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
EX PARTE

DISPUTE:

Claim on behalf of M.R. Galvin the he was improperly denied access to locomotive engineer training.

BROTHERHOOD'S STATEMENT OF ISSUE:

On June 12 1998 the Brotherhood and the Corporation signed a Crew Consist Adjustment Agreement which, amongst other things, provided an option for Conductors, Assistant Conductors and Yardmasters to apply for training to become a locomotive engineer.

On or about July lst the Corporation telephoned numerous conductors and assistant conductors and advised them that they had been selected for the first step of the locomotive engineers' training selection process. Within 24 hours a substantial number were telephoned again and informed that they had not been selected and that they were to return to CN or were laid off as the case may be.

This action resulted in grievances being filed by the Brotherhood requesting that all applicants be treated in the same unprejudiced manner and that all VIA employees be allowed all steps of the selection process to ensure accountability and fair play as the Corporation had already hired outside engineers from newspapers ads during negotiations. The Corporation ignored the grievances and proceeded to the next steps of the selection process with their chosen candidates which included written mechanical aptitude tests and a panel type interview.

The Brotherhood participated in the panel interview (the final step) and successful candidates went on to classroom training and subsequently to the practical on the job portion of their training.

During the selection process it was discovered that different standards and grading of mechanical tests were used in Montreal than in Toronto which resulted in the standards being lowered from 45-50 points to generate the required candidates needed in Montreal.

Once the standards were lowered, additional Montreal and Toronto based employees were selected. Seniority rules were ignored and people who now qualified under the lower standard were then advised of new or different reasons that they were being by-passed by junior employees.

Local grievances were filed in relation to a variety of complaints surrounding the selection process. Several weeks later letters were sent out to rejected candidates inviting them to make appointments for feed back interviews to which their Union representatives were invited to observe and record reasons for denial.

In some case the rejected applicants were sent home and advised to return to CN. In other cases these employees were simply laid off and are facing a severance. In a few instances some have accepted work in a different bargaining unit within the Corporation.

The Brotherhood contends that the selection process used by the Corporation did not contain the spirit and intent of the June 12th agreement and that employees were in fact not granted equal opportunities in the area of potential locomotive engineer training.

We have concluded that there are 2 categories of complainants in this policy grievance. To clarify and avoid confusion, the Brotherhood would advance and present this grievance with the following groups in mind.

1 . Employees who were initially bypassed without explanation and denied all steps
of the selection process.

2. Employees who were selected and qualified after the standards were lowered
but were rejected ahead of people junior to them who also qualified after the

standards were lowered.

The Brotherhood is seeking that employees who were initially denied be given the right to the selection process and that people who were selected and later rejected following "lowered standards" be given their right to continue on in the process.

CORPORATION'S STATEMENT OF ISSUE:

The Corporation and the Union reached an agreement for the implementation of the Crew Consist Adjustment (the "Crew Consist Adjustment Agreement") on June 12, 1998. It provided for, among other items, that a joint locomotive engineer training program would be jointly developed and implemented by the Corporation and the Brotherhood.

It also provided that those conductors who applied for, qualified and obtained positions as locomotive engineers would receive the same rate of pay.

The selection process for the locomotive engineer training was a three stage process; work record review, aptitude testing and interview. If an applicant was successful at the prior stage they would proceed to the next level. In the final interview, there was a Union representative present who agreed in the decision reached.

Those candidates who were unsuccessful upon review of their work record were advised of the decision as quickly as possible. Initially the Corporation was not able to review the decision personally with each unsuccessful candidate. However, subsequently, all those who were unsuccessful were given the opportunity to personally review their application and the decision made.

An issue did arise as to the administration of the aptitude testing for the candidates. In order to ensure fairness, the standard needed to progress to the next stage was adjusted to allow more candidates the opportunity to qualify for the locomotive engineer training.

All candidates who applied were given a full and unprejudiced consideration. The Corporation administered the process in a fair and equitable manner to all applicants but unfortunately not all who applied were successful.

The Corporation asks that this grievance be dismissed.

FOR THE BROTHERHOOD:	**FOR THE CORPORATION:**
(SGD.) **J. TOFFLEMIRE**	(SGD.) **E. J. HOULIHAN**
GENERAL CHAIRMAN	FOR: **DIRECTOR, HUMAN RESOURCES & LABOUR**
	RELATIONS

There appeared on behalf of the Corporation:

J. Lafleur	- Counsel, Montreal
E. J. Houlihan	- Senior Manager, Labour Relations, Montreal
J. H. Rousseau	- Regional Officer, Operations, Toronto

And on behalf of the Brotherhood:

J. L. Shield	- Counsel, Ottawa
J. Tofflcmire	- General Chairman, Toronto
M. Galvin	- Grievor

There appeared on behalf of the Observer, Canadian National Railway:

J. Coleman	- Counsel, Montreal

And on behalf of the Observer, United Transportation Union:

D. F. Wray	- Counsel, Toronto
W. G. Scarrow	- Vice-President, Ottawa

AWARD OF THE ARBITRATOR

At issue is whether employee M.R. Galvin, whose position as a conductor was abolished by the Corporation, was improperly denied access to locomotive engineer training. More specifically, the issue is whether the application of the work habits assessment to Mr. Galvin properly forecloses further consideration of his application for reasons which are unreasonable, arbitrary, discriminatory or in bad faith. There being no meaningful allegation of discrimination or bad faith, the principal focus of the grievance bears on the reasonableness and/or arbitrariness of the Corporation's decision that Mr. Galvin should not be considered for the further steps of the selection process, because of his purported failure to successfully pass the work habits assessment.

The training program for locomotive engineers, and the selection process relating to it, was the subject of an agreement made between the parties on May 26, 1998. The elements of the basic aptitude test agreed upon are reflected in the following six steps contained within the parties' agreement:

Steps:

1. Background and experience. (Personal and discipline records)
2. Meet medical standards
3. Meet physical requirements of the locomotive engineer's position Example: hand brake application etc. (New Employee)
4. Mechanical aptitudes
5. Learning skills. (Thomas Profile Report, to be used only as a tool for guidance purposes)
6. Interview (BLE to be involved)

It is common ground that Mr. Galvin was eliminated at step 1 of the above listed steps, based on the Corporation's opinion that he must be disqualified from further consideration in light of his prior disciplinary record and documented work habits. The work habits assessment is itself a six step exercise in which five areas of performance are assessed and rated as "unacceptable" or "acceptable". The sixth category is the final evaluation based on the accumulation of the first five. The form utilized indicates that to receive an "acceptable" final evaluation the candidate "... must receive acceptable score in all five categories".

The first category is headed as follows:

> Complies with CROR, GOI and Regulations (consider compliance with M003, safety, VIA and Regional Instructions, System Special Instructions and creating unsafe conditions).

The second category is headed:

> Reports for assigned duty (consider absenteeism, booking sick, protecting assignments, booking off on call and reporting late).

The third step in the work habits assessment reads:

> Demonstrates the ability to fulfil the role and responsibilities of a Conductor (including team player, professional conduct, ability to handle unforeseen situations). Carries out and completes work assignment.

The fourth section of the assessment form reads:

> Other (review record for entries such as conduct unbecoming, insubordination, vandalism or leaving premises without authorization, mishandling customer situations).

The fifth section, headed "Evaluation of Work Habits" reads:

> Displays appropriate work habits. Timely and accurate train journals and incident reports, reference materials always available, proper uniform and grooming etc.

Mr. Galvin, who indicated locomotive engineer training as his first priority on the election form supplied to him following the abolishment of his position, was assessed for the purposes of the work habits assessment form on June 30, 1998. He was ruled unacceptable in the first, fourth and fifth categories described above.

In respect of the first category, dealing with operating rules infractions and the like, the Corporation found three instances of prior discipline registered against Mr. Galvin which it considered to be sufficient to render him unacceptable. The first involved the assessment of a ten demerit infraction on December 21, 1990. That incident involved operating a train without the proper daily operating bulletin upon the introduction of a new system. Secondly, on February 21, 1992 Mr. Galvin was assessed ten demerits for a violation of CROR 104 resulting in a damaged switch at the Windsor wye. Thirdly, on October 14, 1996 his record reflects five demerits for his failure to comply with the Corporation's notice to operating employees 94-126. In that circumstance Mr. Galvin failed to report that his crew did not report to work on time.

Under the fourth category, dealing with behavioural. problems while on the job, the Corporation points to an assessment of fifteen demerits in March of 1996 arising out of a verbal altercation between Mr. Galvin and a Corporation official in the Montreal station. Secondly, it notes the assessment of five demerits for an incident in which Mr. Galvin wore running shoes to work, notwithstanding a specific directive to the contrary made to him by a Corporation officer.

Under the fifth category, the evaluation of work habits, the Corporation looked to incidents dating back to 1988 concerning a number of matters which did not culminate in discipline. Included among these are, for example, brief delay of

train incidents in October of 1988 and in April of 1998. Another incident, also in 1988, involved Mr. Galvin providing assistance to an injured passenger, but failing to fill out the appropriate incident report. The record also contains reference an alleged abuse of booking rest in 1988 and a passenger complaint in June of 1995. As noted, none of these incidents resulted in discipline, although the latter contains a notation that the grievor was counselled for the manner in which he spoke to the complaining passenger.

In the Arbitrator's view it is significant to note that the Corporation's internal documentation, including a memorandum entitled "Instructions on Work Habits Assessment Form" includes among the suggestions to those responsible for completing the form the following comment:

> In assigning ratings for each category, the candidate~s **discipline record for the previous five (5) years** should be taken into consideration and noted. Since it is not possible to establish absolute criteria as limits of acceptability, e.g. 20 demerits points for rule violations, it is the responsibility of the C.S. Managers performing the rating, to fully examine the circumstances surrounding the incident and whether or not the candidate has had reoccurring demerit points of a similar nature.
>
> (emphasis added)

The Arbitrator has no difficulty with the foregoing notation. Indeed, it would appear to be consistent with general principles of discipline which have long held that it is inappropriate for an employer to give undue weight to discipline from the distant past, a reflection of the common sense proposition that an employee should be assessed on his or her behaviour and performance in a time period reasonably proximate to the date at which a decision in respect of that individual is to be made.

When that consideration is kept in mind, the Arbitrator is left with some legitimate concerns as to the use made of relatively stale disciplinary and other material in Mr. Galvin's record. The grievor has been employed in the railway industry for some thirty-five years, the last nineteen of which have been in the service of the Corporation. While such employment longevity is not of itself a guarantor of acceptable behaviour and work performance, it does indicate long service as an acceptable employee.

The Corporation's representatives indicate that items on an employee's

disciplinary record involving cardinal rules infractions or violations of operating rules would be of the utmost importance in assessing the suitability of an applicant for locomotive engineer training. The Arbitrator has no difficulty with that statement of priority. Where Mr. Galvin is concerned, however, the operating and rules infractions assessed against him date back some ten and eight years respectively, as regards the failure to have the proper daily operating bulletin, and the violation of CROR 104. When regard is had to the five year period immediately before the assessment of Mr. Galvin, there are no significant rules infractions with respect to train movements to be found in his record. In substance, the record is reduced to three incidents in 1996: the failure to report the late booking of his crew, his verbal exchange with a Corporation official in Montreal and his wearing of running shoes at work after he was otherwise instructed. it is common ground that at the time of his work habit assessment his disciplinary record stood at twenty demerits.

After a careful review of the record the Arbitrator is compelled to agree with Counsel for the Brotherhood. I am satisfied that the Corporation gave undue weight to stale-dated discipline in Mr. Galvin's case, to the point of unreasonableness. 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. Obviously, if there had been a repeat of CROR rules infractions over that time the conclusion might be different. In fact, all the recent record shows is relatively minor discipline for three incidents in 1996, none of which are rules related. Nor does the non-disciplinary side of the grievor's record and work habits in my view disclose a significant pattern or recurring failings which would reasonably disqualify Mr. Galvin from consideration.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that Mr. Galvin be reinstated forthwith into the selection process, as having successfully concluded the first step relating to his background and experience.

April 14, 2000

MICHEL G. PICHER
ARBITRATOR