

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3361**

Heard in Montreal, Tuesday, 9 September 2003

concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Concerning the assessment of twenty (20) demerits to the record of Ms. Rosalie Werhun for alleged "failure to meet the Corporation's performance standards."

UNION'S STATEMENT OF ISSUE:

The discipline assessed was not for the inability to perform the work in a competent fashion, but rather, for the inability to work fast enough to meet the arbitrary criteria set by the Corporation. It is the Union's position that the assessment of discipline in this case was unwarranted for the following reasons: First, the Union had never agreed to the performance standards as outlined by the Corporation; second, Ms. Werhun was not treated even-handedly with respect to her peers. In this regard the Union suggests that Ms. Werhun has been discriminated against as a result of her union activities. This is a violation of article 2.1 of the collective agreement no. 1, as well as section 94.1 and 94.2 of the Canada Labour Code; third, the statistics raised by the Corporation are flawed and do not take into account Ms. Werhun's medical difficulties which would make her lack of performance, if it did in fact exist, non-culpable.

In the alternative, it is the Union's position that if the Corporation were correct in its assessment of "non-performances"; that assessment must be considered as non-culpable, in that the grievor was unable to perform to standard. She should have been allowed to access other positions within her seniority group, but was consistently denied the ability to exercise her seniority to other positions outside the Telephone Sales Office.

Accordingly the Union is asking that the discipline assessed to the grievor be expunged from her record.

FOR THE UNION:

(SGD.) D. OLSHEWSKI

NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

L. Laplante – Senior Officer, Labour Relations, Montreal
E. J. Houlihan – Sr. Manager, Labour Relations, Montreal
M. Boulanger – Director, Telephone Sales Office, Toronto
L. Cowan – Manager, Telephone Sales Office, Toronto
M. Hudon – Legal Counsel

And on behalf of the Union:

D. Olszewski – National Representative, Winnipeg
T. Blanchard – Regional Bargaining Representative, Toronto
Q. Lam – Witness
R. Werhun – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that the grievor has registered low productivity as a telephone sales agent over a substantial period of time. First hired by CN in 1974, and in the service of VIA Rail since September 29, 1978, the grievor apparently worked without difficulty as a counter sales agent in Toronto until January 15, 2000 when she transferred to the Telephone Sales Office (TSO). Her work as a TSO agent is, like that of other employees, evaluated on the basis of computer data gathered periodically. In three levels of measured performance Ms. Werhun was the least productive employee in her category, among some forty-seven employees in her classification.

The record establishes that for a number of years the Corporation has maintained performance goals for telephone sales agents. The standard is established so as to respond to 80% of incoming calls within forty-five seconds. The Corporation has standards for direct call processing, the time utilized to process or handle a customer's call while in telephone contact with a customer, as well as post-call processing, the time which may be required after the conclusion of the call to complete the transaction in the Corporation's data system. The standard established for calls per day handled by a telephone sales agent is ninety.

During the period January to October of 2001 the average calls per day for all employees was eighty-two, with a significant number of employees meeting or exceeding the average. The lowest performer of all was the grievor, who registered an average of forty-one calls per day during the period between January and October of 2001. In respect of direct call processing, the standard established is 195 seconds of telephone contact with the customer. The average achieved for all employees during the surveyed period was 187 seconds, with more than half the employees being at or better than the target standard of 195 seconds per call. Again, the grievor was the weakest performer of all, registering an average of 298 seconds of time in direct call processing. Finally, with respect to post-call processing the established goal of thirty seconds or less was again met by a substantial number of employees, with the whole group averaging thirty-nine seconds. Ms. Werhun, however, again was the worst performer by far, recording an average post-call processing time of 166 seconds. To put that performance in perspective, her average recorded time was more than twice that of the fourth worst employee in the category.

The record establishes that the Corporation attempted to correct the grievor's performance by providing verbal counselling, on some fifteen occasions. The unchallenged evidence is that that counselling did not have any positive effect over time, although there were occasional temporary improvements recorded in Ms. Werhun's performance.

The issue in the case at hand is whether the grievor was deserving of discipline and if so whether, on the whole of the evidence, the assessment of twenty demerits to her record was reasonable in the circumstances. A related issue is whether the standards established by the Corporation are appropriate.

It is clear to the Arbitrator that the Corporation is entitled to establish reasonable performance standards, and to periodically evaluate the performance of employees with respect to their

success in approaching or achieving those standards. In the case at hand the standards were clearly communicated to the grievor. The evidence further establishes that the goals may not have been attained in all cases by all employees, and indeed employees who failed to reach the goals were not necessarily counselled or disciplined if their performance was reasonably close to the standard. In fact, only one employee other than the grievor was disciplined for insufficient productivity in the period January to October of 2001, while twenty-one employees other than the grievor were given coaching sessions to improve their performance. On the whole the Arbitrator is satisfied that the system of goal setting and ongoing productivity evaluation put in place by the Corporation is not unreasonable nor in violation of the provisions of the collective agreement.

The real issue in the case at hand becomes the appropriate measure of discipline. Clearly the grievor failed to respond to ongoing counselling with respect to the need to improve her productivity standards as a telephone sales agent. The fact that she was last in all three areas of evaluation, and the dramatic margin between herself and other employees, leaves no doubt that the Corporation was entitled to resort to discipline in the circumstances. It should be stressed that the instant case does not appear to involve incapacity or a fundamental inability to do the work, as evidenced by the fact that the grievor did, for a time following some counselling sessions, appreciably improve her work standards. Nor can the grievor claim surprise or unfairness, to the extent that she was given non-disciplinary counselling and coaching on some fifteen prior occasions.

The fact remains, however, that the instant case involves the first measure of actual discipline against Ms. Werhun for her low productivity. In other words, while her record of under-performance and counselling may be extensive, from the standpoint of discipline this case involves a first offence. In the Arbitrator's view the assessment of twenty demerits for a first disciplinary infraction is excessive, in the circumstances. Bearing in mind that the grievor is an employee of some twenty-nine years' service, and that the purpose of discipline is rehabilitative, and not punitive, I am satisfied that the assessment of five demerits would have been sufficient in the circumstances to bring home to the grievor the importance of improving her performance standards. Any subsequent failure to improve to an acceptable level could then be dealt with by more severe penalties, in keeping with principles of progressive discipline.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor's discipline be adjusted to reflect the assessment of five demerits for her failure to meet the Corporation's performance standards.

September 19, 2003

(signed) MICHEL G. PICHER
ARBITRATOR