

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Air Canada

And

CUPE, AC Component

(aCHQ-17-23, CHQ-17-38, CHQ-17-39 & CHQ-17-66)

Before: William Kaplan
Chief Arbitrator

Appearances

For Air Canada: Karen Sargeant
Gillian Round
Faskens
Barristers & Solicitors

For CUPE: Adrienne Lei
Dewart Gleason
Barristers & Solicitors

The matters in dispute proceeded to a hearing in Montreal on July 24 & 27, 2018 and in Toronto on December 13, 2018.

Introduction

In July 2016, Air Canada announced and subsequently introduced the On Board Service Managers program (hereafter “OBSM”). Following implementation, the union filed a number of policy grievances: CHQ-17-38, improper held out of service, failure to offer corrective training, and demotion without just cause, CHQ-17-39, interference with union representation rights, CHQ-17-66, failure to provide OBSM assessment reports to Service Directors, and CHQ-17-23, improper use by OBSMs of union crew rest facilities. Following case management submissions, I directed on January 3, 2018 that these four policy grievances be consolidated and that they be heard in advance of a small number – approximately 15 – of individual Service Director grievances taking issue with disciplinary demotions among other matters. I further directed, for efficiency, and other reasons, that the company proceed first without in any way interfering with the union’s overall evidentiary onus. Both parties filed detailed briefs, extensive and numerous will-say statements, and other materials in advance of the hearing that proceeded in both Montreal and Toronto. As the policy grievances are disposed of in this award, the outstanding individual grievances may now be scheduled for hearing.

Overview of the Position of the Parties

In the union’s submission, and summarily stated, notwithstanding any asserted and salutary purposes, the OBSM program was little more than a tool designed to arbitrarily discipline and demote mostly senior Service Directors in contravention of fundamental principles of progressive discipline and in violation of the negotiated terms and conditions of the collective agreement and Air Canada’s own policies, such as, for example, Competency and Training.

What the OBSM program has meant in practice is that mostly senior Service Directors, long service employees, men and women with little or no discipline on file, have been demoted, more often than not, for minor service-related infractions. They were denied union representation, and were not even provided with the copies of the assessments that led to their demotions. The OBSM program has led, in the union's view, to a hostile work environment, one characterized by fear and distrust. Among other things, the union sought, in the adjudication of the policy grievances, an end to the arbitrary and capricious treatment of Service Directors (and to the use by OBSMs of union crew rest facilities).

From Air Canada's perspective, the purpose of the OBSM program was to improve customer service and satisfaction by providing assistance and coaching to Service Directors. The OBSM program was part and parcel of a corporate goal of improving service performance and Air Canada's international service rankings. The OBSM program, it submitted, was reasonable, measured, clearly communicated, transparent and fair. In the company's submission, the union's policy grievance allegations were completely without merit (the individual grievances were a different matter to be addressed at another time).

Air Canada took the position that the union had not met, and could never meet, its evidentiary obligation of demonstrating that its standardized and fairly administered OBSM policy – and any of its terms – was unreasonable and contrary to law. The company asked that all grievances be dismissed.

The OBSM Program in Practice

Considerable evidence was tendered, as mentioned above – in will-says, documentation, and in evidence at the hearing – about Air Canada’s initiatives, of which the OBSM program was part, to enhance customer service. According to Air Canada (although much, but not all of what follows, is not disputed), the OBSM was directed at improving onboard service. An Onboard Service Excellence Checklist was developed, containing 15 Touch Points that cabin personnel were required to apply on every flight. The 15 Touch Points (also known as the Onboard Service Excellence Checklist) are weighted (although there are certain variances depending on length of flight/service). The 15 Touch Points were repeatedly brought to the attention of cabin personnel, a process that began after the announcement of the OBSM program in July 2016; a program that followed up on pre-existing Service Director Excellence initiatives.

In September 2016, Air Canada hired 29 full-time OBSMs. Their primary role was to coach, guide and assess Service Directors, primarily in the onboard service environment. Again, from Air Canada’s perspective, the OBSMs, trained as Flight Attendants, but working as managers, have as their primary function, supporting, coaching and assessing Service Directors to ensure compliance with the 15 Touch Points, and to recognize Service Directors who meet and exceed expectations. There are almost 1600 active Service Directors.

The OBSM program began to roll out in October 2016. No assessments were performed in the first four months; instead, the OBSMs only coached and provided feedback on the 15 Touch Points. The assessment process was discussed at a union-management meeting held on

December 19 2016, including the fact that the 15 Touch Points were weighted. In February 2017, OBSMs began performing formal assessments.

The assessment process can be summarily stated. Approximately 4 to 7 days before it begins, the selected Service Director receives an email from the OBSM introducing himself or herself and explaining the process. The letter identifies the pairing the OBSM will be joining the Service Director. The email attaches the 15 Touch Points that the Service Director will be assessed on, and it explains the overall assessment process. The Service Director is invited to contact the OBSM in advance if they have any questions, and the Service Director is also referred to other resources.

The process begins with a coaching flight. The OBSM attends on that flight, and during it provides the Service Director with feedback on the 15 Touch Points – where improvement is required and where standards are not being met (although some Service Directors declined feedback). In general, however, the Service Director is told where he or she meets or exceeds expectations and where he or she “needs improvement.” The Service Director is entitled to ask questions. On this coaching flight, Service Directors are not assessed on a pass/fail basis.

Following the coaching flight, there is an initial assessment flight and it usually occurs within 24 hours of the coaching flight if the coaching flight was an international flight or 1 hour if the coaching flight was a domestic flight. In general, results are reviewed after passengers have deplaned. Until February 2018, OBSMs were not provided with a copy of the completed

assessment forms at this review, although they were, in general, provided with details of their results. If the Service Director met or exceeded expectations, i.e., as per the 15 Touch Points, the OBSM assessment concludes. Of the 1382 Service Directors assessed as of July 3, 2018, 1142 met standards while 268 exceeded standards. If a Service Director does not meet standards, the Service Director is offered voluntary but paid one on one coaching/debriefing. A second assessment flight will typically be scheduled within 30 days of the initial assessment flight. Again, the measure is the 15 Touch Points.

By and large, most Service Directors who receive a second assessment flight meet or exceed expectations. Of the 1382 Service Directors assessed of July 3, 2018, 86 did not meet standards on the initial assessment flight. Only 18 Service Directors did not meet standards on the second assessment flight (16 of whom were demoted). Another debriefing is scheduled, but this time at base. The union may attend the debriefing and, if so, base management also attends, both the union and base management as observers.

At this debriefing, the Service Director is informed that he or she is being held out of service and informed of the date and time of a performance meeting (usually a day or two later). According to Air Canada, the Service Director is provided at the performance meeting with an opportunity to explain why he or she failed to meet expectations, and to offer any other relevant information. Again, according to Air Canada, following the performance review, base management considers the information provided at the performance meeting, any new information that is provided, the Service Director's attitude and demeanour during the

performance review, the specifics of the assessment report, and the disciplinary and performance history of the Service Director including passenger complaints.

The usual and predominant Air Canada response is demotion – although not every Service Director is demoted and the length of individual demotions varies. At the conclusion of the demotion, retraining is arranged with an emphasis on the 15 Touch Points and, in particular, the specific underperforming areas identified in the assessment reports. Returning Service Directors are also offered at least one non-evaluated coaching flight.

Union Submissions

In the union's submission, the entire OBSM program was flawed in its inception, design and implementation and had been from the outset. Various individual circumstances outlined in the will-says of seven demoted Service Directors were advanced to illustrate the different submissions on point (although the employer took the position that while individual circumstances could be advanced in the individual grievances, they were not appropriately either addressed or relied upon in policy grievances). In any event, the union took the position that the weighting of the 15 Touch Points had not been properly disclosed to the union, if at all, that the manner in which Service Directors were debriefed following the initial assessment flight and the second assessment flight was completely inadequate and oftentimes actually improper. The union further took the position that no real corrective training was offered: Simply referring the Service Director to the 15 Touch Points, and various other materials, some of which had a peripheral, at best, connection to the sought after service standards, did not

come close to achieving the company's professed intention of helping Service Directors succeed.

The union also argued that the collective agreement was repeatedly breached.

For example, and this was critical, under the collective agreement, a Service Director could only be held out of service if the employee's behaviour constituted a threat to safety, fellow crew, passengers or the company or where his or her presence was unacceptable from a passenger point of view. That was an extremely high threshold, and it could not be met because of some trivial failure to meet an arbitrary service standard, and a number of examples, again drawn from the seven will-says, were provided to illustrate this point. Holding a Service Director out of service should only occur in the most serious case. This provision was not, the union argued, appropriately applied when that service standard could actually be met with coaching and instruction. Holding mostly senior long-standing Service Directors out of service for alleged and often minor breaches was completely disproportionate and provided yet another illustration of the over-bearing and unreasonable nature of the OBSM program.

The denial of union representation during the second assessment aggravated the situation, one that was already intolerable. The OBSM program was terribly and irreparably flawed, illustrated by the fact that demotion was the inevitable and overwhelming default disciplinary response. This demonstrated that there was, at the very best, only lip service being paid to the principles of progressive discipline where individual circumstances had to be considered and addressed. The OBSM – a manager – was clearly engaged in a performance review during the second assessment as discipline was inevitable. The collective agreement entitlement to union

representation was clearly established and under the terms of the OBSM program had been, from inception, repeatedly and systematically breached.

Indeed, in the union's submission, staging the meeting by beginning with "feedback" and then moving shortly thereafter to discipline did not, in the union's estimation, affect in any way its essential character. With exceptions that were so limited as to be factually and legally irrelevant, the company demoted the Service Director in virtually every single case. Evidence in the hearing had established that as soon as a Service Director was twice noted as needing improvement, he or she was automatically and mechanistically demoted without any real regard to context and circumstance. Instead, the company should have continued to coach and, at the very worst, for the most serious service transgressions, it should have issued, 3, 7 and 14 day suspensions, with the lengthier suspensions reserved for repeated failures, not trivial one-off infractions. Demotions were, second to termination, the most severe discipline an employee could receive and should be reserved for the most clear-cut case.

The automatic demotions were, the union emphasized, a gross breach of the doctrine of progressive discipline and amply illustrated the ulterior and punitive motives at work. Instead of demotion for trivial infractions, Service Directors should be informed of their shortcomings and given the opportunity to improve. Automatic demotion was *per se* a violation of the collective agreement and virtually all governing authorities. Service Directors had a collective agreement entitlement to a just cause standard, and the rote application of a demotion to a failure to meet expectations, or needs improvement in the company's parlance, was, the union argued,

completely contrary to the proper application of just cause. These demotions were, by definition, and in both theory and practice, without just cause. The OBSM program could be, and should be, struck on this basis alone. There was only one result for this breach – the OBSM program had to be set aside along with all of the individual demotions that had occurred in purported compliance with it.

Other aspects of the OBSM program in practice were also objectionable. The fact that the company did not, until very recently, provide Service Directors with copies with their assessment reports – the very documents that formed the basis of the discipline – further illustrated how flawed the OBSM program actually was. The law was settled that employees have both procedural and substantive rights to information so that they can effectively address performance concerns that have been raised. Article 14.02.01 memorialized that right, and the employer's obligation: An obligation that had been repeatedly breached. This was another reason supporting an arbitral finding that the OBSM program was an unreasonable exercise of management rights. And, finally, the union submitted that the crew rest facilities were for Service Directors and Flight Attendants, not OBSMs, and even the changes that the company had introduced giving Service Directors and Flight Attendants priority were insufficient given the balance of power between them and the OBSMs. For all of these reasons, and others, the union asked that its policy grievances be upheld and the requested remedies awarded.

Employer Submissions

In the company's view, the OBSM program met all of the requirements for reasonableness in its design and implementation. As earlier noted, Air Canada took the position that specific individual grievances taking issue with one aspect or another of the program were matters to be addressed in those individual cases, not in a series of policy grievances. Put another way, and referring to only one example, whether an individual Service Director had been properly or unjustly demoted by the OBSM policy was a matter for individual review not one subsumed in policy grievance taking issue with the program as a whole.

Turning to the specific grievances, the company was entitled under the collective agreement to hold an employee out of service if it was of the view that the employee's presence was unacceptable from a passenger point of view. The 15 Touch Points set out basic requirements of customer service, and if a Service Director could not meet them after coaching and two assessments – and the overwhelming majority of Service Directors easily reached this threshold – then he or she was obviously not providing acceptable customer service. The Service Director was entitled to contest this determination but this, again, was a matter for an individual grievance, not for a policy grievance. Insofar as the OBSM program was concerned, Air Canada was entitled to set and maintain customer service standards. It had to bring those standards to the attention of the Service Directors – which it repeatedly did – and it had to bring to their attention when they failed to meet those standards – which it also did. Service Directors were informed of deficiencies and provided with multiple opportunities to meet standards.

It was worth emphasizing, Air Canada argued, that before any Service Director was held out of service, the policy provided repeated opportunities to improve performance. There was no “gotcha;” what there was instead were repeated attempts by the company to encourage the Service Director to improve performance, and repeated opportunities and resources made available to the Service Director to assist him or her in doing so. The fact that Service Directors had been repeatedly told about the 15 Touch Points, provided a copy in advance of the coaching flight, and were actually informed when that flight would take place, was also something worth keeping in mind. So too was the statistic that in a population of approximately 1400 Service Directors who had been assessed by July 3, 2018, only 18 failed to meet standards following the second assessment.

The company also rejected the union assertion that demotion was the disciplinary default and preordained result for a Service Director who failed to meet standards. While most Service Directors who were held out of service did eventually receive a demotion, some did not, and the length of the demotion was tailored to individual circumstances. Air Canada noted that not every Service Director who was demoted was discipline-free. In addition, in the employer’s view, there was no collective agreement obligation to allow for union representation in OBSM debriefings – including those held at base following the second assessment – as they were “feedback,” not performance-related or disciplinary. In Air Canada’s submission, the OBSM took no part in any disciplinary decision and so the review of the assessment results was neither discipline, nor performance-related.

Insofar as CHQ-17-23 was concerned, the company rejected the union's assertion that Service Directors and Flight Attendants had exclusive access to crew rest facilities. There was nothing in the collective agreement that restricted the crew rest units to operating crew. They were the property of the company. Even so, Air Canada had made clear in its communications with the union that OBSMs would only access the bunks where doing so did not interfere in any way with the contractual entitlements of cabin personnel. Service Directors and Flight Attendants had priority, and OBSMs only used the bunks after the OBSM confirmed with the Service Director that the operating crews had obtained their contractual rest. In addition, if the Service Manager indicated that the OBSM was not to use the crew rest units, the OBSMs had been instructed to take their rest elsewhere, including sitting on a jump seat if there was no empty passenger seat. In these circumstances, Air Canada asked that this grievance be dismissed.

Finally, Air Canada acknowledged that when the OBSM program began, the software being used did not allow for individualized assessment reports to be provided to Service Directors – the forms contained information related to other cabin crew that could not be readily redacted. Accordingly, in the debriefings, Service Directors were given the content of the assessments but not the assessment forms themselves. The union's grievance – CHQ-17-66 – was filed in September 2017. Beginning in 2018, Service Directors have been provided with copies of the report and so the problem identified by the union has been resolved. In these circumstances, the company asked that this grievance also be dismissed.

Award

In my view, and subject to the comments, findings and award that follow, the OBSM program, in general, meets the *KVP* test ([1965] 16 LAC 73 at para. 34).

The evidence establishes a *bona fide* business justification for improving service standards. The union was notified about the forthcoming introduction of the OBSM program. The union was informed about the possibility of discipline for repetitive behaviour: “If it is a repetitive issue we will have to react” and “...if they consistently can’t do the job, then yes, we may have to demote” and “if we see individuals not able to live up to our expectations, then we will demote.” The union was also informed on several occasions that the 15 Touch Points were weighted. The union spent a great deal of time examining whether the OBSM program was successful – here the parties have agreed to disagree. But that is not the point. What matters is whether achieving levels of consistent service came within the legitimate exercise of management’s rights, and the answer to that question is yes.

There were clearly some operational issues as the OBSM program rolled out, and while standardized, some of the evidence introduced by the union – primarily the will-says of seven demoted Service Directors – while not challenged in this proceeding (that will come later), indicates, on an anecdotal basis, inconsistencies and deviations from those standards, on one occasion or another, and in many of its aspects. Needless to say, this evidence remains to be tested.

In the meantime, the seven union will-says of demoted Service Directors were not determinative as the four matters in dispute are policy grievances where the policy or program is subject to an overall reasonableness test. The program itself can be found reasonable – as it is here – but its application in individual cases can be contested, as is also the case here. To be sure, and taking the seven union will-says of seven demoted Service Directors at their highest, indeed, at face value, the application of the OBSM program in some individual cases may not have been appropriate even if the applicable touchstones of *KVP* are met. The application of the policy is appropriately challenged in these individual grievances – grievances that can now be scheduled for a hearing on their merits.

CHQ-17-38

This grievance is partially allowed and partially dismissed. If the policy provided that in every single case of failure to meet expectations on the second assessment a Service Director was demoted, then the grievance would succeed as this would constitute a complete fettering of discretion and would be, by definition, contrary to the just cause provisions of the collective agreement and governing principles of progressive discipline. The evidence, however, establishes that in some cases – admittedly very few – there has been, following a review of individual circumstances, no demotion, and that in others, the length of the demotions has varied depending on individual circumstances. In particular, of the 18 Service Directors who failed to meet standards, two received no demotion, most received demotions of six months, a few received demotions of 12 months and only 3 received demotions of 24 months. Without passing any judgement whatsoever on whether any, or all, of these demotions were with just

cause, it would not be fair, given these statistics, to conclude that these disciplinary demotions were the result of the mechanistic application of a pre-determined policy.

It simply cannot be said, as the union asserted, that the OBSM program was intentionally punitive and disciplinary. Only 1.3 percent of the almost 1400 Service Directors who passed through the OBSM program failed to meet standards – and this was after a coaching flight and two assessment flights. The statistical evidence does not support the union claim. Nor can it be said that senior Service Directors were targeted. There is no evidence of that. Both of these claims are categorically rejected.

While the OBSM program itself does not fail on a reasonableness test, or because it is contrary to the collective agreement, the propriety of individual demotions is appropriately examined in the individual cases. As has been stated before in other cases between these parties, progressive discipline must be applied – employees must be told what they need to do to improve and what the consequences will be if they fail to do so. When these individual demotions are reviewed, whether progressive discipline has been applied will be central to the adjudication of these individual disputes.

To the extent that, for example as was asserted by the union, a subsequently demoted Service Director was not adequately informed about where exactly he or she needed improvement, or was not offered optional coaching, or was not given feedback, or only given cursory feedback, or some other procedural or substantive failure, these will all be important matters to address

in the individual demotion cases. To the extent that a Service Director was demoted for a truly trivial matter, that too will be something for arbitral examination. In the meantime, the employer may hold a Service Director out of service on the basis that his or her presence was unacceptable from a passenger point of view. Whether in an individual case purported failure to meet the 15 Touch Points meets this collective agreement standard – which does not require as the union asserted actual passenger complaints – is a question that is best answered in the individual cases. Air Canada gets to determine reasonable service standards, and the union gets to contest their application.

In terms of the coaching aspect of the OBSM program, I can only conclude, in general, and again subject to the individual grievances, that the purpose of the program was directed at improving customer service by setting reasonable customer service standards. The process was standardized and Service Directors were informed of their deficiencies and provided with the opportunity and resources to address them – an invitation some of them declined.

Undoubtedly there were bumps in the rollout, undoubtedly there were some inconsistent applications, mistakes, deviations from standardized practices, and possibly collective agreement violations – but on an individualized basis not the result of a failure of the OBSM program on the whole (with the exception of CHQ-17-39, discussed below).

The extraordinarily small number of Service Directors who were unable to meet the 15 Touch Points after three opportunities – 15 Touch Points that the company described as basic, and this characterization was never disputed by the union – provides ample evidence of a positive

and corrective, not punitive, approach. Service Directors could decide whether they wished feedback and/or follow-ups. Virtually every single Service Director who had a second assessment met or exceeded expectations. The union was advised that the tool was weighted, but as a best practice, and consistent with the overall objective – improving performance – the union and its members should have been advised which parts of the 15 Touch Points are given the most weight and the exact standards that have to be met to pass. Air Canada is directed, forthwith, to inform the union and individual Service Directors of the weighting and grading. To this extent, this grievance is allowed and a declaration issued.

CHQ-17-39

Grievance CHQ-17-39 is allowed. Article 14.02.01 is clear: “During an interview between the Company and the employee, and where disciplinary action is contemplated, or where a performance meeting is held, the employee may request the presence of a Union representative.” There is no question, on the facts, that the base OBSM performance review following the second assessment is captured by Article 14.02.01. OBSMs are managers – as one email from Air Canada states: “An Onboard Service Manager is a Manager.” The Position Description indicates: “Responsible for the administration and handling of disciplinary investigations and meetings with employees.” Accordingly, a Service Director is entitled to union representation at this base debriefing as it is clearly a “performance meeting.” This conclusion is reinforced by the fact that discipline, of one kind or another, was almost always imposed following the second assessment. Accordingly, the union is entitled not only to attend, but to participate at the base OBSM debriefing. To the extent that any individual Service

Director was adversely impacted by this breach, the appropriate remedy can be addressed in their individual grievance.

CHQ-17-66

CHQ-17-66 takes issue with the company's failure to provide OBSM assessment reports to Service Directors. This grievance, however, is moot as the contested information is now being provided. Understandable as the explanation may be for the initial and ongoing failure to actually provide the assessment reports, doing so was by definition unreasonable and it was completely contrary to the stated purpose of providing Service Directors with an opportunity to meet standards. Telling a Service Director about deficiencies, but not leaving him or her with an actual copy of the assessment, is completely counter-productive and should have been addressed on a priority basis. To this extent, I issue a declaration of breach.

CHQ-17-23

Turning finally to CHQ-17-23, improper use by OBSMs of union crew rest facilities, that grievance is dismissed. There is nothing in the collective agreement that provides Service Directors and Flight Attendants with exclusive access to crew rest facilities. The measures that Air Canada has put into place for the possible use of these facilities by OBSMs are limited, restrained, respectful and acknowledges the absolute priority of Service Directors and Flight Attendants to priority access for their contractual rest. There is no evidence that any aspect of the OBSM program interferes in any way with collective agreement entitlements to crew rest. This grievance is dismissed.

Conclusion

At the request of the parties, I remain seized with respect to the implementation of my award.

DATED at Toronto this 7th day of January 2019.

"William Kaplan"

William Kaplan, Chief Arbitrator