

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1042

Heard at Montreal, Wednesday, February 9, 1983

Concerning

VIA RAIL CANADA INC.

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

Discharge of Porter W. McCray for having molested two female passengers while assigned to Sleeping Car 1424, June 5, 1982.

JOINT STATEMENT OF ISSUE:

On June 5, 1982, two female passengers occupied lower 5 in Sleeping Car 1424 between Montreal, Quebec and Truro, Nova Scotia.

Both passengers submitted separate written reports to the Corporation stating they were molested by Porter McCray.

A hearing was held on June 21, and as a result, Mr. McCray was discharged.

The Brotherhood appealed the Corporation's decision and requested the employee's reinstatement to his former position with full seniority and compensation for all lost earnings.

The Corporation declined the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) TOM MCGRATH
NATIONAL VICE-PRESIDENT

FOR THE CORPORATION:

(SGD.) A. D. ANDREW
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

A. Leger – Labour Relations Officer, Montreal
F. G. Schram – Transportation Officer, Winnipeg
D. J. Matthews – Manager, Human Resources, VIA Rail, Moncton

And on behalf of the Brotherhood:

W. C. Vance – Regional Vice-President, CBRT&GW, Moncton
T. McGrath – National Vice President, Ottawa
K. Sing – Local Chairman, Halifax
M. MacFadden – Witness
W. McCray – Grievor

AWARD OF THE ARBITRATOR

The grievor, an employee of some eighteen years' service, and who was working as a sleeping car Porter, was discharged for having molested two female passengers during the morning of June 5, 1982. If the grievor did in fact molest the passengers concerned, then there was just cause for his discharge. The issue in this case is whether or not the allegations against the grievor are in fact true.

The evidence is in direct conflict on a number of points. There is some agreement as to the general course of events at the time in question, however, and that can be set out as follows. The two female passengers, Mrs. D. and Mrs. F. boarded Train No. 14 at Montreal on June 4, 1982, going to Truro, en route to Sydney. Train 14 left Montreal at 2050 hours. The two ladies were to share berth lower 5 in car 1424, of which the grievor was Porter. They were shown to their berth, which was already made up for the night. Upon inquiry, they were advised that the bar car was a few cars ahead, and after a few minutes the two ladies went to the bar car. Their evidence is that they each ordered a beer, and that later in the evening they each had another. That evidence is corroborated by that of Mr. S., a Company Official who happened to be traveling on the train. It is contradicted by that of the Steward-Waiter in the bar car, whose evidence is that one of the ladies ordered a Tia Maria and milk while the other ordered a beer; that the same orders were repeated once; and that subsequently each of the ladies had three beers. That contradiction cannot be resolved, on the evidence before me, by any precise finding as to the amount the two ladies may have had to drink.

Some while after Train No. 14 had left Montreal, the two ladies made the acquaintance of two gentlemen, Mr. S. and Mr. M., Officers of the Company, who were traveling together and who had accommodation in Roomettes 9 and 11, also in car 1424. The evidence is that Messrs. S. and M. drank nothing but Coca-Cola during the course of the evening. The four passed most of the evening together in the bar car, and shortly before the bar closed went to S.'s roomette where they continued talking. After a while, Mrs. D. indicated that she needed to go to the bathroom, and Mr. M. said that she could use the facilities in his roomette, which was adjoining. Mrs. D. did so, and returned to say she had been unable to flush the toilet. Mrs. F. then said that she too needed to use the toilet, and that she would flush it. She returned later to say that she had also been unable to find the flush mechanism: Mr. M. then said he would show them where it was. He did so, and he and Mrs. F. then remained in Roomette 11, while Mrs. D. and Mr. S. returned to Roomette 9.

It was the ladies' evidence that it was sometime between 0130 and 0200 hours when they left the roomettes and went to their berth. It was their testimony that Mrs. D. went first, nodding to Mrs. F. through the doorway of Roomette 11, the door being ajar, and that Mrs. F. followed five or ten minutes later. Thus, on their evidence, the two ladies would have been in their berth, lower 5, shortly after 0200. They remained there, on their evidence, until about 0600, when the incident, involving the grievor is said to have occurred. This evidence seems contrary to the statement of Porter Brothers, who was on guard duty in the sleeping cars, that lower 5 was not occupied, with the bed still made up, while he was on guard duty. It is not clear, however, when that period ended. The grievor was resting at that time, but resumed active duty about 0335.

Sleeper Car Conductor Hampden also stated that berth lower 5 was unoccupied, but again the statement is not precise as to the time of that observation. Conductor Hampden stated as well, however, that at about 0335, as he passed Roomette 9 (occupied by Mr. S.), a person started out of the room but returned on seeing him. When he passed the door on returning, "the lady with the black hair" (evidently Mrs. D.), started to come out of the roomette, but went back in again upon seeing him.

Mrs. D.'s testimony is that she had a difficult time sleeping that night, what with the sounding of buzzers, and the occasional light of a flashlight in her face (the grievor denies having a flashlight). She testified that she awoke to find the grievor seated on her berth, leaning over her, but with his feet on the ground. She cried out once, but was told to be quiet, and that he only wanted to kiss and hug her. Mrs. D. realized then that Mrs. F. was not in the berth. The grievor, according to Mrs. D.'s testimony, was mauling her. She protested that she was married, and the grievor is said to have replied that he was too. Mrs. D. kept calm, and eventually asked the grievor to go, and let her sleep. He did so. Shortly thereafter, however, Mrs. D. heard a "scuffle" outside the berth and after a moment Mrs. F. – fully dressed – came through the curtain, even although it had been buttoned up. The grievor then appeared, and the two ladies then fled, Mrs. F. dressed and Mrs. D. in a nightgown (and according to Mrs. F., but not Mrs. D., a housecoat). After a ruse to avoid the grievor, said to be chasing them, the two ladies went directly to Roomette 11. Mrs. F. pounded on the door and when it was opened rushed in and jumped on the bed. Such is her own statement. Mrs. D.,

in her statement says "... I saw Maureen jumping in a bed and by this time the Porter was stopped to the left of me, so I ran past him and jumped in the bed too". Roomette 11 was occupied by Mr. M. who, according to the only evidence on the point (that of the grievor) was not dressed.

This evidence is almost all denied by the grievor. His evidence is that he first saw Mrs. D., on the morning of June 5, at about 0430, when she was returning from the washroom and mistakenly tried to get into lower berth 1. The grievor, who considered that Mrs. D. was intoxicated, assisted her to lower 5. Shortly after that the grievor was called to lower 5 where Mrs. D. enquired as to the whereabouts of Mrs. F. She then said that she knew anyway where Mrs. F. was, that (according to the grievor's evidence) "She is in the first roomette around the corner and I was in the second roomette. He put me out of his roomette because the crews would be getting up soon".

It was, according to the grievor, at about 0630 (after he had had his breakfast) that he saw Mrs. F. come out of Roomette 11. A little while thereafter, he found her in bedroom D, where he would not allow her to remain. When she got up, she put her hands on his hips, but he said that didn't work with him and that she must leave. She addressed some offensive remarks to him, and he advised that the Conductor would collect a fare from her for the room. She then went to lower 5 to speak to Mrs. D., and it was shortly after that that the two ladies went – or fled – to Roomette 11.

Mrs. F.'s account of the grievor's actions is different. She states that, in the early morning of June 5th she had gotten out of lower 5 to go to the washroom and since it was already light, had gotten dressed there. When she returned, she was about to unbutton the curtains of lower 5 and get in the berth when she was seized from behind, and taken to bedroom D, where the grievor told her she could lie down, and where he sought to hug and kiss her. She eventually persuaded him to leave, and after waiting a moment, she then returned to lower 5 and met Mrs. D. It was then – when the grievor reappeared that the two ladies went to Roomette 11.

These accounts are irreconcilable. In a case such as this, the onus is on the employer to show, on the balance of probabilities, that events occurred which constituted just cause for discharge. Given the nature of the events alleged, the law is clear that just cause must be shown (always according to the balance of probabilities), by clear and cogent evidence. In the instant case, I am unable to conclude, on the evidence before me, that such proof has been made. No doubt, as I have indicated, if the grievor's behaviour was as the ladies alleged, then there would be just cause for discharge. Those allegations, however, are not satisfactorily established by the evidence before me. It would appear, on all the evidence, more probable than not that the ladies were not in their berth at the times they said they were. Without commenting on all the details of the evidence, it must be said that the lack of hesitation with which they "jumped" into the bed in roomette 11 casts considerable doubt on the whole story. There is, unfortunately, motivation for the promulgation of the story: if S and M were guilty of some misconduct, they would protect themselves by casting the grievor in the role of a wrongdoer. That consideration would account for the evident suspicion with which the sleeping car Conductor treated them while the matter was being "dealt with" by yet another, and more senior Company Officer who happened to be on board.

It must be added that the Company's case is weakened by the fact that the matter was not investigated in the manner apparently called for by the regulations. I do not consider that this was the fault of the Conductor, who only indirectly became aware of what had occurred, and to whom no complaint was made. The matter was "taken care of" by a higher Company Officer, who himself took no statements from those concerned, sought no witnesses, and apparently suggested to the ladies the form of letter they might later write. Such an informal approach to the matter is not consistent with the seriousness of the offence alleged against the grievor, which called for prompt and careful investigation.

There is no issue before me for determination as to the conduct of Mr. S. or Mr. M. I make no findings of fact which would be binding on them. It is sufficient for the purposes of this award simply to declare that the evidence does not establish that the grievor in fact committed the very serious offence with which he was charged. Just cause for the imposition of discipline has not been shown, and the grievance is therefore allowed. It is accordingly my award that the grievor be reinstated in employment without loss of seniority and with compensation for loss of earnings.

(signed) J. F. W. WEATHERILL
ARBITRATOR