

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1119

Heard at Montreal, Tuesday, July 5, 1983

Concerning

VIA RAIL CANADA INC.

and

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

DISPUTE:

Discharge of E. Wheeler, Montreal, for misappropriating revenue while assigned as steward-waiter, Train 622, October 19, 1982.

JOINT STATEMENT OF ISSUE:

CN Police officers (Special Branch) submitted written reports of their observations made while travelling on Train 622, October 19, 1982.

The officers reported observing the grievor serving tea to a passenger in a thermo cup which had been previously used.

A hearing was conducted and, as a result, Mr. Wheeler was discharged for misappropriating Corporation revenue.

The Brotherhood requested that the grievor be reinstated in the services of VIA with full seniority rights, benefits and lost wages.

The Corporation rejected the request.

FOR THE BROTHERHOOD:

FOR THE CORPORATION:

(SGD.) TOM MCGRATH

(SGD.) A. GAGNÉ

NATIONAL VICE-PRESIDENT

DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

A. Leger	– Labour Relations Officer, Montreal
A. R. Cave	– Manager, Human Resources, Montreal
C. O. White	– Labour Relations Assistant, Montreal

And on behalf of the Brotherhood:

G. Thivierge	– Regional Vice-President, Montreal
R. McGregor	– Executive Assistant, Ottawa
T. McGrath	– National Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The grievor, an employee of some eighteen years' service, was discharged for allegedly misappropriating Company revenue. The evidence relates to one incident in which the grievor is said to have served a passenger tea, and collected payment therefor, without accounting for the payment. The misappropriation of funds would not normally appear, because the grievor, it is said, served the tea in a cup which had already been used, and the accounting for revenues for such sales is based on the number of cups used.

If the grievor did in fact use such a procedure and misappropriated funds, then I would agree that he would be subject to discharge. The issue in this case is whether or not the grievor did in fact knowingly serve tea in a used cup.

It was the grievor's testimony that he did not do so and had never done so. There would appear to be some possibility that another employee had washed out a styrofoam cup of the sort used, and that the grievor might unwittingly have used it. I do not think that possibility would prevail against clear and compelling evidence of the grievor's having re-used a cup. In the instant case, however, the evidence of identification of the cup used is not clear and compelling. The evidence of the police officer is that he made certain marks on a styrofoam cup in which he had been served coffee, and that that cup along with others was left in a bag on the counter when he and the other officer with him had finished their coffee. About thirty minutes later, the officer observed the grievor serve tea to a female passenger, and receive payment. It was the officer's testimony that the cup used was a cup he had previously marked. Later, when the train arrived at Gaspé, the officer went to the place the passenger had been sitting and took the cup from the litter bag.

At the time the officer saw the tea being served, the cup was in the grievor's hand, and I do not consider that the officer could properly identify any marks on the cup. Later, when he retrieved what I am prepared to assume was the same cup from the litter bag, he may well have seen marks which resembled those he had made. These marks, simply scratches made on the side and bottom of a styrofoam cup with a fingernail, were not, I think, sufficiently particular or distinctive that they could permit a clear identification of the cup as the one in which the officer's coffee had previously been served. Such cups, in course of use, may well be marked consciously or unconsciously in a way that would resemble the scratches made by the officer. The evidence of identification, I find, is not clear and compelling, and I do not conclude, in the circumstances of this case, that the grievor did in fact commit the offence alleged.

Just cause for discipline has not been established. It is therefore my award that the grievor be reinstated in employment forthwith, without loss of seniority, and with compensation for loss of earnings and other benefits.

(signed) J. F. W. WEATHERILL
ARBITRATOR