# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 1163

Heard at Montreal, Wednesday, December 21, 1983

Concerning

## VIA RAIL CANADA INC.

and

## CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

### DISPUTE:

Dismissal of Steward-Waiter V. 0. West, Montreal.

### JOINT STATEMENT OF ISSUE:

Mr. West was dismissed for misappropriation of Corporation revenue and other irregularities on Train 58, February 11, 15 and 23 and on Train 59, February 22, 1983.

The Brotherhood contended that Articles 24.5 and 24.11 of Agreement no. 2 were violated when the grievor's representatives were not allowed, during the hearing , to make a closing statement. For this reason, the Brotherhood requested that the discipline be cancelled and Mr. West be returned to work without loss of benefits or wages.

The Corporation declined the Brotherhood's request contending that the grievor had the assistance of his representatives throughout the hearing.

| 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 | – Manager, Labour Relations, Montreal |
| L. Sabourin | – On-Board Services Officer, Montreal |
| G. Lalonde | – Clerk-Stenographer, Montreal |
| C. 0. White | – Labour Relations Assistant, Montreal |
| J. Letellier | – Human Resources Officer, Montreal |

And on behalf of the Brotherhood:

| | |
|---|---|
| G. Thivierge | – Regional Vice-President, Montreal |
| I. Quinn | – Accredited Representative, Montreal |
| R. Rouleau | – Local Chairman, Montreal |
| P. Garneau | – Observer, Montreal |
| R. Ougler | – President, Local 335, Montreal |
| V. 0. West | – Grievor |

# INTERIM AWARD OF THE ARBITRATOR

The issue in this case is whether the Employer's decision to discharge the grievor should be annulled because of the Corporation's alleged failure to comply with a fair and impartial hearing as required under Articles 24.5 and 24.11 of the collective agreement:

> 24.5 Employees charged with having committed a major offence will be granted a fair and impartial hearing by the proper office of the Company.
>
> 24.11 Employees, if they so desire may have the assistance of one or two fellow employees, or Local Chairman or authorized committeeman at a hearing.

As the Joint Statement of Issue indicates the grievor, Mr. V. 0. West, was dismissed from his position as steward-waiter for misappropriation of Corporation revenues and other irregularities on Train 58 on February 11, 15 and 23 and on Train 59 on February 22, 1983. In due course after the alleged infractions were committed the grievor was summoned to a hearing on March 30, 31, 1983 before Mr. L. Sabourin with respect to those allegations. During the course of the two day hearing the grievor was represented by Messrs. R. Ougler and P. Garneau (Trade Union representatives). Mr. R. Rouleau, Trade Union representative, also observed a portion of the proceedings. There is no dispute that the hearing, in light of the allegations, was protracted and difficult for everyone concerned.

It appeared at the end of the parties' submissions on the issue of the fairness and impartiality of the hearings chaired by Mr. Sabourin that they were not prepared to proceed with the merits of the allegations against Mr. West that resulted in his discharge. I denied the Trade Union's motion that the grievance be granted in light of the Employer's inability to proceed on the merits of the case. Rather, I adjourned the proceedings until such time as I made my decision on the Trade Union's allegation of a breach by the Employer of Articles 24.5 and 24.11 of the collective agreement. The question of whether a second hearing would be necessary on the merits obviously would turn on the outcome of the Trade Union's preliminary objection.

The Trade Union's objection was two-fold. Firstly it was alleged that a fair and impartial hearing was denied because the grievor and his representatives were denied over the two day period comprising the hearing the opportunity to recess in order to engage in consultation.

In this regard the evidence of both Mr. L. Sabourin and Ms. G. Lalonde, the typist, disclosed that approximately 15 recesses were permitted in order to allow the Trade Union to consult with the grievor. Indeed, the evidence of both Mr. Ougler and Mr. Garneau did not contradict this notion. As a result I find no merit on this aspect of the allegation that Mr. West was denied a fair and impartial hearing.

The second branch of the Trade Union's allegation of an impropriety in the conduct of the hearing is more substantial. Apparently, owing to the protracted and tedious nature of the hearings Mr. Sabourin at the termination of the hearing denied the Trade Union's representatives the opportunity to sum up or give a closing statement of the evidence adduced. Mr. Sabourin perhaps mistakenly, was under the impression that the opportunity given Mr. West "to add" anything he wished to the subject discussed sufficed for purposes of a summation. On the record appears a statement in a letter dated June 4, 1982, signed by a Corporation representative indicating:

> ... nous sommes tout a fait d'accord qu'en vertu de la convention collective et des procédures relatives aux enquêtes, il est permis (au(x) représentait(s) de l'employé à la fin de l'enquête de faire des commentaires pertinents à la cause.

It is alleged that because Mr. Sabourin rejected the grievor's representatives an opportunity to give a closing statement the grievor was denied "the assistance" of his Trade Union representative contemplated under Article 24.11 and thereby was deprived of a fair and impartial hearing" for purposes of Article 24.5 of the collective agreement.

It may be of some significance to note that the Employer extended the Trade Union the opportunity to make such closing statement during the course of the grievance procedure. The Trade Union rejected the Employer's offer because disciplinary action had already been taken to the grievor's prejudice.

It is my view that the Employer's obligation to hold a fair and impartial hearing is for the purpose of ensuring that all relevant facts pertinent to an alleged infraction are disclosed in order that an informed decision with respect to discipline may be made. The hearing's function is principally a fact finding mission. Article 24.5 is designed to make certain that the facts emerge in a fair and proper manner.

The procedure anticipated under Article 24.5 is not a judicial or quasi-judicial exercise. Although the requirements of Article 24.5 ensure a minimum standard of fairness and impartiality in the conduct of a hearing the rules of natural justice or "due process" that apply to the courts and administrative tribunals, such as arbitration boards, do not apply to hearings conducted under Article 24.5 of the collective agreement.

I am satisfied that although Mr. Sabourin may have been remiss, particularly in light of the Employer's assurance, in disallowing the Trade Union's representatives to present a closing statement, no substantial wrong was committed. I am not satisfied that closing statements are either mandatory or essential for the purpose of meeting the requirements of fairness and impartiality under Article 24.5. Indeed the record shows that Mr. Sabourin over the two day period comprising th hearing bent over backwards to ensure a full and complete investigation of the facts relevant to the allegations brought against the grievor.

If the Trade Union wanted to submit a closing statement I do not believe that the exigencies of Article 25.4 prevented the Trade Union's representatives from making such statements in writing after the hearing was completed. Nor does the record show that the Trade Union need be diffident about approaching Mr. Sabourin's superiors directly for purposes of making such representation. The transcript of the proceedings disclosed, in this regard, the Trade Union's success in securing the intervention of the Corporation's officials when Mr. Sabourin was disinclined to grant an adjournment on the first day of the hearing.

In brief, the evidence does not disclose that the grievor was denied "the assistance" of his Trade Union representatives contrary to Article 24.11 merely because of the absence of a summation. More significantly, the record shows that, in having regard to the purpose served by Article 24.5, the grievor was extended ample opportunity to respond to the allegations made against him and to submit evidence to counter those allegations. In this sense a "hearing" was held in accordance with the standards anticipated under Article 24.5 of the collective agreement. For these reasons the Trade Union's objection is denied.

A hearing is directed with respect to the merits of the grievor's discharge.

**(signed) DAVID H. KATES**
**ARBITRATOR**

On Tuesday, March 6, 1984, there appeared on behalf of the Corporation:

| | |
|---|---|
| Me. Luc Martineau | – Counsel, Montreal |
| A. Leger | – Manager, Labour Relations, Montreal |

And on behalf of the Brotherhood:

| | |
|---|---|
| G. Thivierge | – Regional Vice-President, Montreal |
| I. Quinn | – Representative, Montreal |
| K. Cameron | – Local Chairman, Montreal |
| V. 0. West | – Grievor |

## AWARD OF THE ARBITRATOR

A preliminary objection was raised with respect to my jurisdiction to proceed with the merits of the grievor's discharge case based on the restricted nature of the issues raised in the parties' Joint Statement of Issue. That statement was confined solely to the question of whether the Employer violated Articles 24.5 and 24.11 of the agreement. Once those issues were resolved by virtue of my initial decision in this matter, it was argued that this arbitrator's jurisdiction was spent. In short, it was argued that I was wrong and in excess of my jurisdiction owing to the restricted language of the Joint Statement of Issue, in proceeding with the question of whether the grievor was discharged for just cause.

Notwithstanding the plain language of the CROA Rules and Procedures confining my jurisdiction to the issues defined in the Joint Statement of Issue, I am satisfied that the parties consented to the waiving of any restriction on my authority to entertain this grievance on the merits at the hearing on December 21, 1983. At that time both the Employer and Trade Union representatives agreed that based on my findings on the issues raised with respect to the Employer's treatment of the investigation into the grievor's alleged misconduct, I would proceed with the merits of the dispute at a later date. In so doing, the parties thereby amended by their actions the scope of the Joint Statement of Issue to encompass the determination of whether the grievor's discharge was for just cause.

It may very well be that the Employer party may have misunderstood the nature and extent of the agreement; that, however, is no reason to reverse the consensus that was reached. I simply cannot comprehend why the

Employer would construe the agreement to hear the case on the merits only if the Trade Union proved successful in its objections at the first hearing. Surely, the agreement reached would also apply to hearing the merits of the grievance in the event the Trade Union proved unsuccessful in its submissions. The Employer simply cannot have it both ways. For that reason, the Employer is bound by the consensus reached at the initial hearing and its preliminary objection with respect to my jurisdiction to entertain the grievance on its merits is rejected.

The principal cause of the grievor's discharge related to his alleged misappropriation of funds during the course of his performing his duties as a Steward-Waiter on February 15, 22, 23, 1983. It is alleged that the grievor contrary to the rules and regulations governing his job responsibilities served customers liquor from unsealed bottles. He would pour contrary to those rules liquor into the customer's glass and retain the bottles presumably for later use. The evidence disclosed that the grievor also sold liquor from a tray of sealed bottles provided by the Corporation. Those bottles of liquor that were sealed were properly recorded as legitimate sales; those bottles of liquor that were unsealed were not recorded and the monies received as payment were allegedly kept by the grievor.

On each day that the alleged misappropriations took place the grievor was observed by two officers of the CN Police Force. Each officer corroborated the observations of the other officer. Based on their observations of sales made directly to themselves and other customers the grievor is alleged to have sold the following quantities of liquor on the days in question:

Feb. 15, 1983 – 14 bottles
Feb. 22, 1983 – 14 bottles
Feb. 23, 1983 – 21 bottles

The sales records prepared by the grievor only show him to have sold the following number of bottles on the days in question:

Feb. 15, 1983 – 7 bottles
Feb. 22, 1983 – 6 bottles
Feb. 23, 1983 – 7 bottles

The grievor has denied that he has misappropriated monies as alleged by the Corporation. He confirmed that the number of bottles show on his written records represented the exact quantity that was sold. In resolving the conflict in the evidence the grievor provided no reason why the CN Police Officers would contrive a story that would lead to his obvious discharge. The grievor is a long service employee with an impressive record. What possible reason could there be to cause the Employer to seek his discharge?

Based on both the *viva voce* evidence that was adduced at the hearing, and the confirmatory affidavits of the CN Police Officers who observed the grievor's conduct, I am satisfied that the grievor has failed to provide an explanation as to why the quantities of liquor sold by him on the days in question were not properly recorded. The only inference I can draw from the evidence is the conclusion that they were not recorded because the monies received with respect to the unrecorded sales were kept by the grievor for his personal use.

The Trade Union attempted to undermine the credibility of the Employer's case because only one police officer was called to give *viva voce* evidence. It was submitted that each of the officers should have been called to support the Employer's allegations. The evidence before me was comprised of affidavits from each of the officers. My only comment to this submission is that the procedures that govern CROA hearings do not require such extensive *viva voce* evidence to be adduced. If this is not the case, then the parties ought to meet with a view to clarifying the processing of grievances before me.

It was also alleged that the testimony of the CN Police Officer who did give *viva voce* evidence was tainted because it was not credible that he would dispose of the liquor he purchased by pouring it on the floor. I do not know what inference I should draw from this fact assuming it to be true. In this regard this particular charge was denied by the CN Officer in question. But, in any event, at worst, it would only demonstrate, if the liquor was consumed, that the CN Police Officer involved ought to be disciplined for breach of the Corporation's policies. Such misconduct would not, however, detract from the personal observations made of the grievor's actions on the days in question.

Because theft is major misconduct warranting dismissal, this grievance is denied.

**(signed) DAVID H. KATES**
**ARBITRATOR**